OCT 9 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 465

ELIZABETH N. GRAHAM, Individually and doing business at MAINE CHANCE FARM,

Petitioner,

v.

FANNIE K. HERTZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANDREW L. HUGHES
Counsel for Petitioner
220 East 42nd Street
New York 17, New York

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
RULES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
(a) The Underlying Event	3
(b) The Pleadings and "Separate Trial" of the Issue of Res Judicata	3
(c) Plaintiff's Proof at Trial	5
(d) The General and Special Verdicts	8
(f) The Addition of Interest to the Verdict	9
REASONS FOR GRANTING THE WRIT	9
(a) As to Question 1	9
(b) As to Question 2	13
The Legal Principle Underlying Rule 26(d)	15
Application of Federal Rule 26(d)(3)	16
The absence of proof to satisfy the requirements of Rule 26(d)(3)	18
As to Question 3	22
As to the Question 4	23
CONCLUSION	28
APPENDIX	29

TABLE OF CASES

PAGE

Arnstein v. *Porter*, 154 F.2d 464 (2d Cir. 1946) 16

Beedy v. *Washington Water Power Co.*, 238 F.2d 123 (1956) 24

Brite v. *Graham*, S.D.N.Y. Civ. No. 97-240 ..... 3, 4, 5

Camps v. *New York City Transit Authority*, 261 F.2d 320 (2d Cir. 1958) 20

Castner v. *First National Bank of Anchorage*, 278 F.2d 376 (1960) 20

Cate v. *Good Bros. Inc.*, 181 F.2d 146, 149 (3d Cir. 1950) 22

Clegg v. *Hardware Mutual Gas Co.*, 264 F.2d 152, 157 (5th Cir. 1959) 23

Dimick v. *Schiedt*, 293 U.S. 474 (1935) 11

Engle v. *Aetna Life Ins. Co.*, 139 F.2d 469 (2d Cir. 1943) 17

Erie v. *Tompkins*, 304 U.S. 64 (1938) 2, 11

Frederick v. *Yellow Cab Co. of Phila.*, 260 F.2 26(d)(3) 17

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931) 11

Guaranty Trust Co. v. *York*, 326 U. S. 99 (1945) .. 11

Hosie v. *Chicago Northwestern Ry.*, 282 F.2d 639, 642 (7th Cir. 1960) 12

Jackson v. *King*, 223 F.2d 714, 718 (5th Cir. 1955) .. 22

Los Angeles Trust Deed & Mortgage Exchange v. *Securities and Exchange Commission*, 264 F.2d 199 (9th Cir. 1959) 16

Lebeck v. *William A. Jarvis, Inc.*, 250 F.2d 285, 295 (3rd Cir. 1957) 16

National Labor Relations Board v. *Dinion Coil Co.*, 201 F.2d 484, 487-9 (2d Cir. 1952) 16

PAGE

Neckwear Corp. of Puerto Rico v. *First National Bank of New York*, 275 F.2d 295 (1st Cir. 1960) 16

Purcell v. *Long Island Daily Press Publishing Co.*, 9 N.Y. 2d 255 (1961) 9, 10

Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) 11

Revlon, Inc., v. *Buchanon*, 271 F.2d 795 (5th Cir. 1959) 20

Stilwell v. *Hertz Drivurself Stations Inc.*, 174 F.2d 714 (3rd Cir. 1949) 13

Thedorf v. *Lipsey*, 237 F.2d 190 (7th Cir. 1956) 22

T. C. F. Film Corporation v. *Gourley*, 240 F.2d 711 (1957) 24

Turner Construction Co. v. *Haulihan*, 240 F.2d 435 (1st Cir. 1957) 13

United Air Lines Inc. v. *Wiener*, 286 F.2d 302 (9th Cir. 1961) 12

United States v. *Wheeler*, 256 F.2d 745 (1958) 24

Wilson v. *City of Troy*, 135 N.Y. 96 (1892) 10

Western Machine Co. v. *Consolidated Uranium Mines Inc.*, 247 F.2d 685 (10th Cir. 1957) 13

Yohan v. *Ross Cliff Realty Co.*, 267 F.2d 9 (3d Cir. 1959) 13

STATUTES

4 F.R.Serv.2d 26d44, Case 1 1

168 F. Supp. (63a and 79a) 1

23 F.R.D. 17 at p. 92a 1

28 U. S. C. § 1254 (1) 2

Federal Rules of Civil Procedure 26(d)(3), 42(b), 46, 49 and 51 ..... 2, 3

PAGE

15(b) 4

26(d)(3) 8, 13, 14, 16

51 13

43(a) 14

4 Moore's Federal Practice 1194 (2d Ed. N. Y. 1950) 15

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

ELIZABETH N. GRAHAM, Individually and doing business as MAINE CHANCE FARM,
Petitioner,
v.
FANNIE K. HERTZ,
Respondent.

No. ....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELIZABETH N. GRAHAM petitions for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit entered on July 3, 1961, affirming in part and in part vacating a judgment entered by the District Court after general and special jury verdicts in favor of the respondent.

Opinions Below

The opinion of the Court of Appeals (363a-74a)* is officially reported at Fed. 2d and unofficially at 4 F.R.Serv.2d 26d44. Case 1. Three other officially reported opinions in this case which were in question before the Court of Appeals are reported at 158 F.Supp. 201 reargument 168 F.Supp. 755 (63a and 79a respectively) and 23 F.R.D. 17. A fifth opinion which is not officially reported is printed at (92a).

*"App." refers to the appendix to this petition; numbers in parenthesis (000a) refer to petitioner's appendix to the Court of Appeals.

Jurisdiction

The opinion of the Court of Appeals was filed on July 3, 1961. The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of Illinois and the defendant a citizen of New York. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

Rules Involved

The Federal Rules of Civil Procedure pertinent to this petition, namely rules 26(d)(3), 42(b), 46, 49 and 51, are printed in relevant part in the Appendix hereto.

Questions Presented

1. Whether the Court of Appeals, by ordering a new trial of the single issue of adding to the verdict of the previous jury the sum of $7,892.10 as interest from the date of the accident to the date of the verdict ignored the requirements of *Erie* v. *Tompkins* by failing to conform to the law of New York and deprived petitioner of her right to trial by jury within the meaning of the Seventh Amendment.

2. Whether a trial court pursuant to Federal Rule 26(d)(3) properly may permit the use of deposition testimony with the attendant deprivation of cross-examination in the absence of proof to support a finding that the deponent was not within 100 miles of the court.

3. Whether the trial court deprived petitioner of substantial rights by framing a "special verdict" which omitted

a critical issue of fact and law and failed to comply with the provisions of Federal Rule 49(a) or (b).

4. Whether in the absence of intervening circumstances the trial court pursuant to Federal Rule 42(b) properly could order a separate trial of a single issue raised by respondent's reply to a counterclaim and therein reverse on identical papers a denial of summary judgment by a coordinate judge.

Statement

(a) The Underlying Event

About 7:15 o'clock in the clear morning of October 17, 1954, respondent's race horse "Speedy Wave", being run against a stop watch, collided with petitioner's riderless horse "Star of Roses" on the training track at Belmont. Both horses were killed instantly. Two actions ensued; one by respondent's exercise boy, Wesley Brite for personal injuries (*Brite* v. *Graham,* S. D. N. Y. Civ. No. 97-240), the other, which is the present action, by respondent for the loss of her horse "Speedy Wave".

(b) The Pleadings and "Separate Trial" of the Issue of Res Judicata

Both the present action which was filed October 17, 1954, and the *Brite* action were instituted through the same firm of attorneys. Both complaints charged petitioner with (a) harboring a vicious animal, (b) harboring an animal with known tendencies requiring the taking of special precautions in its care and handling, and (c) negligent handling of petitioner's horse.

Petitioner's answers denied liability and affirmatively pleaded contributory negligence and assumption of risk. In

addition, in the present action petitioner counterclaimed that respondent's negligence caused the death of petitioner's horse "Star of Roses". Respondent, replying to the counterclaim on January 18, 1955, pleaded, among other things, the defense of assumption of the risk.

The present action was dormant while the *Brite* action proceeded to trial. The *Brite* action was defended by other counsel. That action, tried before the Honorable Archie O. Dawson and a jury in May of 1957, resulted in a substantial general jury verdict for Brite. No appeal was taken.

After the successful termination of the *Brite* action, respondent on November 1, 1957 moved, under Federal Rule 15(b): (a) for an order permitting her to serve a supplemental reply raising the defense of *res judicata* (based on the *Brite* action) and (b) for summary judgment dismissing petitioner's counterclaim on that same ground (16a). Both motions were denied by the Honorable Irving R. Kaufman on December 23, 1957 (63a, 70a). Respondent's motion for reargument was granted and summary judgment again denied on January 23, 1958 (79a, 81a). Judge Kaufman, however, stating that it couldn't prejudice anyone, granted respondent leave to file a supplemental reply pleading *res judicata* (81a, 83a).

After the case had been assigned to Hon. Richard H. Levet for trial, respondent renewed her effort for summary judgment on the counterclaim under the guise of a motion under Rule 42(b) for a separate trial without a jury, of the narrow issue of *res judicata* raised by her supplemental reply (84a). On April 21, 1960 the motion was granted and the separate trial followed immediately before Judge Levet (92a). On that "trial" respondent merely submitted the same papers that had been before Judge Kaufman twice on the motions for summary judgment two years earlier (33a-82a). Judge Levet, nevertheless, reversed

Judge Kaufman's decision by filing an opinion that same day dismissing the counterclaim, denying finality, and refusing certification of an appealable question (96a). The Court of Appeals, agreeing with Judge Levet and disagreeing with Judge Kaufman concerning the applicability of *res judicata* to petitioner's counterclaim, affirmed the dismissal. In so doing it denied that Judge Levet was bound by any "law of the case" and thereby for all practical purposes destroyed that doctrine as a viable concept in the Second Circuit.

The trial of the other issues followed before Judge Levet on April 25, 26, 27 and 28, 1960 (106a).

(c) Plaintiff's Proof at Trial

Respondent endeavored to support her claims by introducing the testimony of two live witnesses and three depositions imported from the *Brite* action.* The Court of Appeals has found, however, that the "testimony tending to show that [petitioner] had been guilty of negligence came entirely from [the] three depositions".**

Of the five witnesses, both live ones, respondent's exercise boy Brite and her trainer Parke, were present on the training track on the morning of the accident, as was O'Neil, one of the *Brite* action deposees. The other two depositions from the *Brite* action, those of Cochrane and Griffiths, were

---

*Although respondent's counsel was the same in both actions, which were instituted simultaneously, notices of the *Brite* action depositions were never given to us as attorneys for petitioner in this action.

**Since the Court of Appeals ignored the issues of absolute liability and higher standard of care in its opinion we do not know its views with respect to evidence supporting those issues. We believe, however, that the claims of absolute liability and the keeping of an animal with propensities requiring a higher standard of care also depended entirely upon the same three depositions. It is the only such evidence in the case.

concerned solely with the habits of petitioner's horse "Star of Roses" prior to the accident.* Neither of the live witnesses offered testimony as to how or why the accident occurred or as to any special habits or tendencies of petitioner's horse or its prior conduct on the morning of the accident.** The

---

*The O'Neil deposition also contained such testimony. See footnote—pages 21-22, infra.

**Since there was no dispute that a collision between the two horses did occur and resulted in the death of both, the critical facts at issue concerned the duty each owner owed to the other in the circumstances surrounding the accident; the maner of handling race horses at the training track and the knowledge of the risks of the sport which guided the respective employees of the parties in such handling.

Respondent's live witnesses, Brite and Parke, testified that Brite rode "Speedy Wave" to the Belmont training track in the company of Parke, the trainer, and Paul Miller, another exercise boy, both of whom were mounted (120a). They planned to breeze (run the horse a measured distance against a stop-watch) "Speedy Wave" that morning.

The trio entered the training track between the ¼ pole and the 3/16th pole (counter-clockwise from the mile pole). As they came upon the track two men and a horse ("Star of Roses") were standing at the inside rail, 90 to 100 feet across the track. "Star of Roses" was riderless; being held on a shank (a chain and leather lead) by one of the two men standing alongside.

Respondent's trainer, Parke, upon viewing the riderless horse and two men at the inner rail thought that the exercise boy had been "throwed" and that the horse was unruly (186a). Although conceding this knowledge (186a) Parke did not alter his plan to breeze "Speedy Wave" between the 3/8th pole and the mile pole; the one place on the mile long training track where he knew "Star of Roses" was being "unruly". Moreover, Brite, who was riding "Speedy Wave" didn't even give thought to the conduct of "Star of Roses" (154a).

With apparent clairvoyance, trainer Parke shouted to the men at the inside rail "You better get that horse off the track before you get run over" (174a). Nothing was said to Parke in response (174a). Instead, an exercise boy mounted "Star of Roses" who was then led by the other man across the track to the outside rail (121a). Thereafter, Parke and his exercise boys walked their horses slowly counter-clockwise on the training track toward the mile pole. In so doing, they passed within 10 or 15 feet of "Star of Roses" who was then at the outer rail. Parke said nothing about his intention to breeze "Speedy Wave", nor did he indicate that he intended to breeze

O'Neil deposition, therefore, was most critical to respondent's case on simple negligence since he was the only witness to "Star of Roses" behavior on the morning of the accident.* Exclusion of the depositions would have necessi-

---

only at that particular portion of the mile long track (144a, 146a). Neither Brite nor Parke saw any other horse being breezed.

Parke took up a position with a stop watch at the 1/16th pole while Brite continued around the track on "Speedy Wave". Brite thereafter gradually increased the gait. He galloped "Speedy Wave" to about the 3/8th pole, and while standing in the stirrups, looked across the infield toward "Star of Roses". Brite saw that "Star of Roses" was still being quiet and held on a shank by someone at the outside rail (166a-67a). It does not appear that he again bothered to look ahead toward "Star of Roses".

Just before he reached the 3/8th pole, some 7 or 8 minutes after he started around the track, Brite "broke" "Speedy Wave" into a run and crouched flat on her back (123a) in a position where he could "glance back and forth and watch" (123a). Brite could see over and across the inside rail, if he looked (126a, 166a). In any event, just before he reached the 3/16th pole, about 12 seconds later, he saw a loose horse 10 or 15 feet away coming toward him "on the rail". The two collided (124a).

Parke added little to Brite's description of the event except to indicate that Brite apparently was not looking where he was going (175a). Upon seeing the collision, Parke galloped to the dead horses and then went on to look for the "man who had a hold of that horse" ["Star of Roses"] (176a). He could not find him although he testified that the man was still holding "Star of Roses" a little more than 11 seconds before (180a, 190a).

*Other than testimony previously noted concerning "Speedy Wave's" entrance upon the track, Parke's belief that "Star of Roses" was unruly at that time, and the actual collision, the only testimony concerning "Star of Roses' " behavior earlier in the day was from the O'Neil deposition (296a-298a). O'Neil stated that "Star of Roses" came on the track the morning of the accident with an exercise boy on his back. The handlers turned him loose and "He ran his usual procedure, 100 yards or so and then propped and wheeled and dumped the boy. He wheeled around, ran half the way back and was caught" (297a). O'Neil then saw defendant's handlers put a shank on "Star of Roses" and take him to the outside rail (298a).

There is no other testimony of "Star of Roses' " behavior prior to the accident that morning. In particular, none of respondents witnesses gave any testimony as to how "Star of Rosses" got loose; whether he was turned loose, or broke away or whether the shank was still attached to him when he was killed.

tated a dismissal of the action or a directed verdict in favor of petitioner.

Petitioner strenuously objected to the use of these critical depositions upon the ground that there was no showing that the deponents were unavailable as required by Federal Rule 26(d)(3); that cross-examination of these witnesses was critically necessary; and, that the content of the testimony which the Court was editing was highly prejudicial. These objections and the trial courts' handling of them are set forth in detail in our discussion of Question 2, (infra, pp. 13 et seq.). Hence, we merely note here that the trial court overruled the objections and permitted the use of all three depositions as edited.

The Court of Appeals affirmed on the ground that the requirements of Federal Rule 26(d)(3) were met.

(d) The General and Special Verdicts

Shortly before charging the jury, the trial court presented counsel with a complex set of questions which was denominated a "special verdict". This "special verdict" (102a) which the court called a "long laundry list" (358a) was comprised of many conclusory questions. Counsel was requested to make objections immediately. This resulted in rampant confusion which is clearly manifested in the colloquy of court and counsel (330a-340a). The net result of this last-minute effort by the court to utilize a "special verdict" was the omission of any question concerning respondent's assumption of the risks attendant upon use of a training track.

The jury filled out the "special verdict" submitted by the court and also returned a general verdict in the sum of $27,300 against the petitioner. Petitioner argued on appeal that the trial court's use of the "special verdict" in this case was improper and prejudicial and eliminated from jury consideration a critical issue on which considerable evidence

had been adduced, namely, assumption of the risk. The Court of Appeals completely ignored this argument.

(f) The Addition of Interest to the Verdict

Subsequent to the verdict, the clerk did not enter judgment forthwith pursuant to the provisions of Federal Rule 58. Instead, the trial court several days later signed respondent's proposed formal judgment which included interest for the period between the date of the accident and the date of the verdict in the sum of $7,892.10 (102a). The Second Circuit vacated the award of interest and remanded the case to the District Court "for trial by jury of the issue of the discretionary award of interest on the amount of the respondent's loss as found by the previous jury."

Reasons for Granting the Writ

This petition presents a number of questions which are essentially unrelated in law. Their sole identity is that they arise in the same case. In our ensuing discussion, therefore, we have treated each question presented as a separate entity and on its own merits. Nevertheless, we believe the petition as a whole presents important questions of federal practice and procedure important to all litigants as well as conflicts of decision that should be resolved by this Court.

(a) As to Question 1.

1. The decision of the court below ordering a new trial of the single issue of adding interest to the verdict of a previous jury is directly in conflict with the decision of the Court of Appeals of the State of New York in *Purcell v. Long Island Daily Press Publishing Co.*, 9 N.Y.2d 255 (1961).

In the *Purcell* case, the New York Court of Appeals held that the trial court's addition of interest to the verdict must be stricken from the judgment upon the ground that the jury "must award it to them, and if plaintiff had asked for

it here, he might well have received it" (p. 259). In reaching its decision the New York court reiterated the rule of *Wilson* v. *City of Troy*, 135 N.Y. 96 (1892) "that the award of interest in a negligence action was for the jury to determine."

The Second Circuit in the present case, instead of striking the allowance of interest as the New York court did in *Purcell*, remanded that single issue to a new jury. It reasoned as follows:

> "The lower New York courts, as indeed did we, *Newburgh Land & Dock Co.* v. *Texas Co.*, *supra*, and various commentators, 69 Harv. L. Rev. 1158 (1947), gathered from a dictum in *Flamm* v. *Noble*, 296 N.Y. 262, 268 (1947), that the New York Court of Appeals regarded its previous decisions on interest as 'manifestly unsound' and would reverse its prior rulings which had allowed interest as a matter of right in actions for conversion, but had left interest in actions for negligence to the determination of the jury.
>
> * * *
>
> ". . . we do not think that the plaintiff should suffer by reliance upon our earlier interpretations of New York law in being deprived of the chance of a discretionary award of interest by the jury."

The Second Circuit's observation that the plaintiff below "relied" on "earlier interpretations" of New York law is at best speculative and at worst sheer rationalization. In any event, the New York Court in *Purcell* rejected an identical argument (9 N. Y.2d at p. 258):

> "Plaintiff contends that the 'courts of this state have consistently followed the rule suggested by this court in *Flamm*.' *But this is not so.*
>
> * * *
>
> "It should be stressed, of course, that by preserving the law in its present posture the principles of justice and fairness are not offended, for those whose property is destroyed or damaged by the negligent

> conduct of others may still recover interest. The jury, however, must award it to them and, if plaintiff had asked for it here, he might well have received it.
>
> "Accordingly, the judgment appealed from should be modified by disallowing any interest upon the verdict of the jury, and in all other respects affirmed, without costs." (Emphasis supplied).

Thus, it is clear under *Purcell* that a new jury trial of the narrow issue of the addition of interest to a previous verdict could not be obtained in the Courts of New York.

Since the remand order of the Second Circuit in the present case effects a result different from that obtainable in the Courts of New York, it is in conflict with *Erie* v. *Tompkins*, 304 U. S. 64 (1938), *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945) and *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949).

2. The submission to a second jury of the narrow question of whether interest should be added to the verdict of the first jury as ordered by the Second Circuit would deprive petitioner of the right to trial by jury guaranteed by the Seventh Amendment.

Under the Seventh Amendment petitioner is entitled to the substantive rights accorded in a trial by jury as it existed under the common law at the time the Constitution was signed, *Dimick* v. *Schiedt*, 293 U. S. 474 (1935). This Court has ruled that such guarantee includes the right to have the same jury determine all the issues in the case unless it clearly appears that one or more issues are "so distinct and separable from the others that the trial of it alone may be had without injustice." *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 500 (1931). We submit that a jury's exercise of discretion in granting or withholding interest is inseparable from its exercise of discretion in fixing the total sum to be awarded as damages.

This Court recently has denied certiorari in two cases raising issues as to whether severances ordered by the trial court violated rights guaranteed by the Seventh Amendment. *Hosie* v. *Chicago & Northwestern Ry.*, 282 F. 2d 639, 642 (7th Cir. 1960) cert. den. 365 U. S. 814 (1961); *United Air Lines Inc.* v. *Wiener*, 286 F. 2d 302 (9th Cir. 1961) cert. den. — U. S. — (1961). Both cases appear to be consistent in principle and correctly decided in the circuit courts. The present case, however, conflicts in principle with both the *Hosie* and *Wiener* cases.

In *Hosie*, it was determined that the issues of liability and damages in the particular tort action were not so entwined that separate trials of those issues would work an injustice. In *Wiener*, however, it was held that claims for exemplary damages were so dependent upon the degree of culpability involved in the alleged tort that the issues of liability and damages could not be presented to separate juries without confusion and uncertainty amounting to a denial of a fair trial.

In the present case, the Second Circuit has effectively severed the issue of the amount of damages from the determination of granting or withholding interest on that amount. Certainly, these determinations are as knotted together as the issues of liability and exemplary damages which were held inseparable in *Wiener*, *supra*. We submit, therefore, that damages and interest in a negligence action are so integrated and peculiarly within the province of a jury determination as to the total sum to be awarded that such issues cannot be separated and presented to different juries without violating the guarantees of the Seventh Amendment. *Dimick* v. *Schiedt*, 293 U. S. 474 (1935); *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931). Indeed, the Second Circuit's remand in this regard appears, when viewed as a practical matter, to be tantamount to unconstitutional additur, *Dimick* v. *Schiedt*, supra.

3. Remand of the interest issue for trial before a second jury is also in conflict in principle with the plain language of Federal Rule 51, (App., p. 31) which states in relevant part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

It is undisputed that respondent failed to request an instruction to the jury with respect to interest and no such instruction was given. Thus, respondent would have been foreclosed by Federal Rule 51 from seeking in the Court of Appeals the relief which that court ultimately gave. *Yoham* v. *Rose Cliff Realty Co.*, 267 F. 2d 9 (3d Cir. 1959). *Cf., Western Machine Co.* v. *Consolidated Uranium Mines Inc.*, 247 F. 2d 685 (10th Cir. 1957); *Turner Construction Co.* v. *Houlihan*, 240 F. 2d 435 (1st Cir. 1957); *Stilwell* v. *Hertz Drivurself Stations Inc.*, 174 F. 2d 714 (3d Cir. 1949). We submit therefore that the remand is improper for it affords respondent rights by indirection which she could not obtain directly.

(b) As to Question 2.

In approving the trial court's ruling that three depositions* could be read to the jury after editing by the trial court, the Second Circuit has virtually destroyed the vitality of Federal Rule 26(d)(3) as protection against trial by deposition. In relevant part Rule 26(d)(3) provides:

> "The deposition of a witness, whether or not a party, may be used by any party for any purpose *if the court finds*: 1, that the witness is dead; or 2,

*The Court of Appeals found that the "testimony tending to show that defendant had been guilty of negligence came entirely from three depositions which the District Court admitted in evidence."

> that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to get the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." (Emphasis supplied.)

Respondent was put on notice by the pre-trial order* and by timely objection (245a-9a) to demonstrate to the court that the depositions were usable under Rule 26(d)(3). In flat disregard of the rule and contrary to the only probative evidence on this point (*infra,* pp. 24-26) Judge Levet admitted the depositions ignoring the importance of presenting the testimony of witnesses orally in open court. We submit that the decision of the court below is directly contrary to the direction in Federal Rule 26(d)(3) that depositions should be used with "due regard to the importance of presenting the testimony of witnesses orally in open court." Cf. Federal Rule 43(a).

The critical questions, therefore are: Who has the burden of showing that a witness is unavailable; and, what proof will suffice to show such unavailability?

---

*These depositions were neither noticed nor taken in the present action. Instead, they were imported from the *Brite* personal injury action pursuant to a pre-trial order, 23 F.R.D. 17, 23 (SDNY 1958), where Judge Dawson stated:

> "The plaintiff should be allowed to read the depositions taken in *Brite* v. *Graham* * * * provided however that plaintiff meets the same requirements necessary for the reading of any depositions (Rule 26(d)(3) of the Rules of Civil Procedure."

We believe the answers to these questions given in the courts below violate the plain purpose of Rule 26(d)(3) and improperly deprived petitioner of her right to oral testimony and cross-examination.

The Legal Principle Underlying Rule 26(d)

The caveat in Rule 26(d)(3) that "due regard" should be had "to the importance of presenting the testimony of witnesses in open court" is a "warning that this provision is not to be used as authority for trying cases generally upon depositions in the manner in which all equity cases were tried prior to the adoption of the Equity Rules of 1912". 4 *Moore's Federal Practice* 1194 (2d Ed. New York 1950). Professor Moore further observed with respect to this caveat (p. 1195):

> "In the Advisory Committee's Preliminary Draft there was a provision that a deposition could be used for any purpose at the trial 'if the parties affected thereby consent thereto with the approval of the court.' This provision was dropped and the present provision was substituted therefor apparently because it was feared that the court would grant its approval whenever the parties consented to the use of depositions, and thereby to that extent nullify the salutary rule that testimony of witnesses shall be taken orally in open court. That this was not an idle fear is shown by the practice of some courts under the Equity Rules of 1912, which required the testimony of witnesses to be taken orally in open court, but which permitted a departure from this rule by allowing depositions (when not permitted by general statute) to be taken for good and 'exceptional' cause. Some courts in effect treated most equity cases as 'exceptional' if counsel for the litigants agreed to the procedure of using the depositions of witnesses rather than their oral testimony in open court." (Footnotes omitted)

Oral testimony historically has been held crucial as a means of affording the trier of the fact an insight into the credibility of the witness and a basis for evaluating the testimony. See *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 487-9 (2d Cir. 1952) (Frank, J.). It has been considered crucial even when the trial is by the court rather than by a jury. *Los Angeles Trust Deed & Mortgage Exchange* v. *Securities and Exchange Commission*, 264 F. 2d 199 (9th Cir. 1959).

Thus, in *Lebeck* v. *William A. Jarvis, Inc.*, 250 F. 2d 285, 295 (3d Cir. 1957) the court stated:

> "The Court's reading of edited testimony to the jury was an erroneous method of introducing evidence in a jury trial * * *. It is fundamental in common law jury trial that the testimony of witnesses on issues to be decided by the jury shall be developed through the interrogation and cross examination of witnesses in the presence of the jury. * * * The only exceptions are those which have been formalized and defined. A court may not vary this aspect of procedure at will, particularly since in cases at law in courts of the United States jury trial is a matter of constitutional right."

Accord: *Arnstein* v. *Porter*, 154 F. 2d 464 (2d Cir. 1946).

Application of Federal Rule 26(d)(3)

In *Neckwear Corp. of Puerto Rico* v. *First National Bank of New York*, 275 F. 2d 295 (1st Cir. 1960) the First Circuit held that it is the burden of the proponent of the deposition to demonstrate the existence of one of the five conditions of Rule 26(d)(3) before a deposition may be used. This decision is consistent with Professor Moore's observation that:

> "The chief change made by the Federal Rules was the removal of these conditions upon the *taking*

> and making them applicable *only upon the use* of depositions at the trial." (Emphasis in original.) 4 *Moore's Federal Practice* 1028 (2d ed., New York, 1950).*

Accord, *Engle* v. *Aetna Life Ins. Co.*, 139 F. 2d 469 (2d Cir. 1943).

In the present case, however, the Second Circuit relying on *Frederick* v. *Yellow Cab Co. of Philadelphia*, 200 F. 2d 483 (3d Cir. 1952) appears to cast the burden of Rule 26(d)(3) upon the party resisting use of a deposition. One of the stated reasons for affirmance on this issue below is that the trial court's finding is unassailable because "there was no showing at all in opposition". Obviously, "no showing" should be required if the burden is upon the proponent of the deposition. Only the proponent can be prepared on this issue since he alone knows whether or not he will offer the deposition.

We think this suggestion that the burden is upon the party resisting use of the deposition is plainly wrong. Moreover, in the present case there is no showing sufficient to shift that burden.

---

*Thus, under the practice prior to the Federal Rules a deposition *de bene esse* could be taken *only* if (4 Moore's Federal practice 1020):

"1. The witness lived more than 100 miles from the place of trial, or
2. Was bound on a voyage to sea, or
3. Was about to go out of the United States, or
4. Out of the district in which the case was to be tried and more than 100 miles from the place of trial, before the time of trial, or
5. When he was ancient or infirm."

**In any event the *Frederick* case is distinguishable. There the taking of the deposition two weeks before trial was specifically to accommodate an early trial date. It included vigorous cross examination. In the present case, instead of being taken to accommodate the conduct of an impending trial, the depositions in question were imported from another action which had terminated some three years previously.

The absence of proof to satisfy the requirements of Rule 26(d)(3)

Respondent sought to meet the burden of showing that witnesses Cochrane, Griffiths and O'Neil were more than 100 miles from the Court by recalling her trainer Parke, *after* the court had permitted the reading of *all* the depositions over petitioner's objections.* A fair summary of this proof is that respondent showed that one of the deposees *actually* was in the New York area and subject to the court's process. Nothing was developed as to the other two.

Parke testified: (1) that Cochrane actually was in the New York area within reach of the court's process (307a, 310a); (2) that he was not acquainted with Griffiths and only knew O'Neill "when I see him"; (3) that he could give no information as to the last time he saw Griffiths' present whereabouts (309a); (4) that he had not seen O'Neil since 1956 at Belmont, *although O'Neil's deposition was taken in New York City on January 29, 1957* (309a); and (5) that he had made no inquiry of anyone with respect to Griffiths and O'Neil. Moreover, *Parke refused to state under oath that O'Neill was not in New York City* and testified instead that he had no personal knowledg as to O'Neil's present whereabouts (310a).

Respondent sought to make up the utter deficiency of Parke's testimony by her counsel's statement that one of his associates got in touch with the New York Racing Association which had no records of Griffiths or O'Neil, but which did have a record of Cochrane locating him in the

*More significantly respondent's counsel made no effort to locate the deponents prior to using the depositions. It is clear that he should have been required to make such inquiry since, as we have noted, whether or not he intended to use the depositions. In this regard it must be noted that respondent's counsel was able to locate and import the witness Brite from the far west.

New York area (312a). Respondent also relied upon the fact that each deposition showed a distant residence. The O'Neil deposition, however, was taken in New York and all three were itinerants.*

Faced with the proof that one deposee (Cochrane) actually was subject to process, respondent thereupon took the position that petitioner had waived her objection insofar as Cochrane was concerned (312a) despite Judge Dawson's pre-trial provision that "plaintiff should meet the requirements necessary" under Rule 26(d)(3); a fact which was called to the court's attention by defendant at the time of the objection (312a-313a).

Judge Levet having already admitted the depositions overruled petitioner's motion to strike the Griffiths and O'Neil depositions "because of the facts already indicated on the record, and I find that each witness is at a greater distance than 100 miles from the place of hearing" (316a). The Court of Appeals concurred.

In addition to approving use of the O'Neil and Griffiths depositions the Second Circuit held that the petitioner had waived the right to object with respect to Cochrane by stating the ground immediately after the testimony was introduced rather than before. Since Cochrane was actually within 100 miles of the court the issue of waiver became critical.

Petitioner had moved to strike the Cochrane testimony before any further testimony was introduced. Moreover, the trial court immediately thereafter conditionally accepted the O'Neil and Griffiths testimony subject to a motion to strike if the deponents were not shown to be outside the jurisdiction. Hence, all three depositions were in the same

*It is clear from the record that respondent's counsel made no phone calls to and wrote no letters to the witnesses in a effort to locate them.

posture before the jury. We are unable to explain why the trial court or the Court of Appeals believed the Griffiths and O'Neil testimony could be stricken yet differentiated the Cochrane testimony and found a waiver. Certainly, there was ample notice for the trial court and respondent's counsel to meet the objection and cure the defect. They failed to do so (307a-310a).

In any event we submit petitioner discharged her duty:

> "to make it clear to the court that he objects to the court's action, and to state the grounds on which he bases his objection, in order that the defect may be obviated, if possible, * * * (5 Moore's Federal Practice 1903).

Cf. Federal Rule 46; *Revlon, Inc.* v. *Buchanon,* 271 F. 2d 795 (5th Cir. 1959); *Camps* v. *New York City Transit Authority,* 261 F. 2d 320 (2d Cir. 1958).

It is our contention that there is no support in the record for the "findings" of the Courts below that the deponents were more than 100 miles from the place of trial so as to permit the use of the depositions over strenuous objection. Certainly petitioner should not be lightly be deprived of her right of cross-examination and having the jury hear and observe these witnesses.*

Live cross examination was particularly necessary here because these witnesses testified that expert horsemen would have handled petitioner's horse one way while they, qualified as experts, actually handled that horse differently and in a way consistent with his handling on the morning of the accident.* Thus **Cochrane deposed that he was an assistant trainer for petitioner from April to June preceding the October accident. He was charged with supervising the training of "Star of Roses" (234a) who was not as advanced as other horses in the stable (235a). For example, "Star of Roses" would not gallop unless he was led by a lead pony (235a). Instead, he would wheel, dislodge his rider and run off (235a). Cochrane tried for two or three weeks to train "Star of Roses" but then "laid up on him" because "he had a little soreness" as well as being a bad actor (236a).

In sum we believe the decision of the Second Circuit with respect to the showing that must be made under Rule 26(d)(3) and the shifting of all or most of the burden to the party opposing the use of a deposition constitutes a serious inroad on the protection accorded by that rule. It

---

Despite these observations (239a), Cochrane, who was qualified as an expert by respondent (231a-233a), *nevertheless took "Star of Roses" to the main track at Belmont for training at least three or four times without a lead pony* (237a).

Griffiths deposed that he was a trainer for petitioner for *five days* in October, 1954 some time prior to the accident (263a) and that he was in charge of defendant's entire stable at Belmont (263a), including "Star of Roses" (267a). Petitioner, seeking his advice concerning "Star of Roses", advised Griffiths that the horse "had dislodged all riders who had ridden him" (268a). Griffiths, nevertheless, took "Star of Roses", ridden by an exercise boy, to the *main* track at Belmont (269a) where the horse trotted "very well" until they reached the 7/8 pole when he "stopped down dead" (269a). After repeatedly persuading "Star of Roses" to move as before, Griffiths finally slapped "Star of Roses" on the hindquarters with his hand (269a). "Star of Roses" "lashed out" at him. He thereupon rode over to a nearby hedge (269a), pulled a branch from it and "hit 'Star of Roses' several times across the hindquarters, until finally the horse took off into a gallop" (269a). "Shortly thereafter he dislodged his rider (269a). Griffiths then recommended gelding "Star of Roses", hiring a high caliber man to ride him (268a), and using a whip and spurs on him (271a). In making these recommendations, Griffiths was of the opinion that "Star of Roses" was a rogue, a horse that had been broken in poorly," in "incompetent hands to begin with." However, he believed a "rogue" could be "corrected" (270a). Petitioner objected to gelding upon the ground that it would destroy "Star of Roses'" sire value.

In any event, Griffiths, like Cochrane with knowledge that the horse had dislodged all previous riders (269a), *took "Star of Roses" to the track* (where the horse trotted very well) *and made certain recommendations which did not entail giving up on trying to train the horse* (271a).

O'Neil deposed that he was first a foreman and then assistant trainer for petitioner from June, 1953 to May, 1954 preceding the October accident (276a), and that during part of his employment he was charged with responsibility for training and exercising "Star of Roses" (289a-90a). O'Neil observed "Star of Roses" throw an exercise boy or jockey "practically daily" (291a) on the tracks at Belmont, including the training track (291a). On the other hand, O'Neil stated that "Star of Roses" was broken to saddle and "to ride around the shed row or anywhere else he was alone" (292a).

In these circumstances, *O'Neil, respondents' expert, like Cochrane and Griffiths, continued to take "Star of Roses" to the tracks at Bel-*

is inconsistent with the traditional right to have oral testimony and cross-examination, Cf. *Lebeck* v. *William A. Jarvis,* 250 F. 2d 285, 295 (3d Cir. 1957); *National Labor Relations Board* v. *Dinion,* 201 F. 2d 484, 487-9 (2d Cir. 1952), and should therefore be reviewed by this Court.

As to Question 3

The decision of the court below ignored three issues raised by petitioner with respect to the "Special Verdict" used by the trial court: (a) that the special verdict by including many conclusory questions failed to comply with the requirements of Federal Rule 49; (b) that by failing to include an important issue of fact and law in the special verdict the trial court obscured that issue; and (c) that the trial court, by introducing the special verdict at the last minute and requesting objections immediately, rendered it impossible for counsel to clarify the situation.

In *Cate* v. *Good Bros. Inc.,* 181 F.2d 146, 149 (3d Cir. 1950) cert. den. 340 U. S. 826 (1950) and *Thedorf* v. *Lipsey,* 237 F.2d 190, 193 (7th Cir. 1956) it is stated that it is improper under Federal Rule 49 to submit conclusory fact and law questions as distinguished from pure fact questions to a jury. In *Jackson* v. *King,* 223 F.2d 714, 718 (5th Cir. 1955) and *McDonnell* v. *Timmerman,* 269 F.2d 54, 58 (8th Cir. 1959), however, it is held that mixed questions of law and fact may be submitted if the jury is properly instructed.

In the present case the trial court promulgated a confusing set of mixed questions of law and fact (102a-105a). We submit that these questions illustrate the desirability of the *Cate* and *Thedorf supra,* limitation of questions to fact issues. The questions here are so complex that the court itself called it a "long laundry list". The colloquy

---

mont, apparently without a shank or lead pony, in an effort to train him (292a). O'Neil also observed others, presumably his successors in authority, take "Star of Roses" to the track to train him between July and October, 1954 (296a).

between court and counsel clearly indicates the rampant confusion and the fact that neither the court nor counsel could understand the questions or their interrelationship (330a-340a). It resulted in the Court omitting entirely the question of the assumption of risk from the special verdict and riding roughshod over counsel's efforts to clarify the situation (337a-40a). The net result was that the issue of assumption of the risk was not submitted to the jury in any form on the special verdict. This omission was gross error because the jury upon reviewing the special verdict and answering the manifold questions (102a-05a) could never give any consideration to the risks attendant upon use of the training track. The evidence concerning these risks was extensive. The omission is also contrary to the scheme of Rule 49(b) which contemplates the submission of all fact issues to the jury.

The trial court introduced the "special verdict" to accompany the general verdict on the last day of trial. As we have noted, it was a confusing document to both Court and Counsel (330a-340a). Nevertheless, the Court requested objections immediately and was impatient with efforts to clarify the situation (337a-40a). Last minute introduction of the Special Verdict violated petitioners right of fair and adequate notice. See *Clegg* v. *Hardware Mutual Gas Co.*, 264 F. 2d 152, 157 (5th Cir. 1959).

As to the Question 4

The decision of the court below affirming the trial court's dismissal of petitioner's counterclaim* after a co-

*At the outset of this discussion, we note that the court below based its decision on this issue at least partly upon the fact that the jury, in its answer to the "special verdict" found petitioner negligent and respondent free from contributory negligence. The court reasoned, therefore, that even if the counterclaim had gone to the jury instead of being dismissed, the result would have been the same. Aside from being necessarily speculative and hindsight, this argument assumes the correctness of the rulings with respect to use of the deposition testimony and the use of the so called "special verdict" as well as the

ordinate judge had twice denied such relief on identical papers is directly in conflict with the decisions of the Third Circuit in *United States* v. *Wheeler* 256 F.2d 745 (1958) and *T. C. F. Film Corporation* v. *Gourley*, 240 F.2d 711 (1957) and in conflict in principle with the Ninth Circuit in *Beedy* v. *Washington Water Power Co.*, 238 F.2d 123 (1956). It appears to be in accord, however, with the Ninth Circuit decision in *Castner* v. *First National Bank of Anchorage*, 278 F.2d 376 (1960).

In addition to presenting a conflict of decision with other circuits, the decision of the Court below expressly eliminates "law of the case" as a viable doctrine in the Second Circuit:

> "If we thought that Judge Levet was right in his ruling, we could not sensibly upset his decision on the ground that he should have accepted Judge Kaufman's order on the same matter in the motion Judge Kaufman had previously determined. The district court's "law of the case" was not our "law of the case"; and certainly it was not the "law of the case" of the Supreme Court. See *White* v. *Higgins*, 116 F.2d 312, 317 (1st Cir. 1940). It may be conceded to be unseemly for judges of co-ordinate jurisdictions to "review" one another's decisions, and ordinarily they do not do so. Yet in the past we have refused to reverse a case for the purpose of protecting the judicial sensibilities of the judge who first made a ruling on the matter. See *Dictograph Products Co., Inc.* v. *Sonotone Corp.*, 230 F.2d 131, 231 F.2d 867 (2d Cir. 1956), which, we assume, has substantially impaired the apparently stronger statement in *Commercial Union of America, Inc.* v. *Anglo-South American Bank Ltd.*, 10 F.2d 937 (2d Cir. 1925)."

---

propriety of submitting the issue of absolute liability to the jury. If any of these rulings were erroneous, as we argue here, then the dismissal of the counterclaim should also be reversed. In any event, we also urge here, of course, that Judge Kaufman was not only right but that protection of the doctrine of law of the case is sufficiently important to warrant reversing the dismissal of petitioner's counterclaim. Indeed, a different jury might find for the petitioner.

We submit that this decision is nothing less than a hunting license for any litigant dissatisfied with a ruling against him to go out and find a coordinate judge who disagrees with the first judge. Nothing could be more expensive to litigants or disruptive of sound procedure.

In *United States* v. *Wheeler*, supra, the Third Circuit held that it is an abuse of discretion for a second judge to give reconsideration to a decision of a coordinate judge in the absence of changed circumstances or the unavailability of the first judge. In so doing, it expressly disapproved judge shopping and noted its conflict with the Second Circuit (p. 748):

> "[W]e apparently are at odds with the Second Circuit in Dictograph Products Co. v. Sonotone Corp., supra. But if the second judge has as much chance of being in error on the merits as has the first judge in considering the same question, we fail to see why the fortuity (if it can be called that) of the second judge being right in the eyes of the appellate court should affect the operation of the rule designed to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented."

In *Castner* v. *First National Bank of Anchorage*, 278 F. 2d 376 (1960) the Ninth Circuit squarely disagreed with the Third Circuit by holding that "the second judge did not abuse his discretion in reversing the orders of the first judge" (p. 381). In reaching its decision, the Court apparently was impressed by the prospect that the second judge could, by overruling the first judge, eliminate long and expensive litigation and facilitate early appeals (p. 380):

> "The second judge must conscientiously carry out his judicial function in a case over which he is presiding. He is not doing this if he permits what he believes to be a prior erroneous ruling to control the

> case. He can settle the questions presently without compelling the parties to proceed with what may be a futile and expensive trial."

Curiously, the Court then proceeded to reverse, thus saddling the litigants with the costs of an appeal which would have been unnecessary if the second judge had adhered to the ruling of the first. In any event, the Third Circuit in *United States* v. *Wheeler*, supra, expressly rejected such reasoning (p. 748):

> "We are driven to the conclusion that the result in the Dictograph Products case was conditioned by the appellate court's conviction that the second judge had been right in discussing the complaint whereas the first judge had been wrong in not doing so. The case really presents an argument favoring allowance of appeals from the denial of interlocutory orders which if granted would end the litigation, rather then requiring the case to wind through trial to find that the interlocutory order was in error and that the trial had been unnecessary."

The Court then held, as noted above, that it is an abuse of discretion for a judge to review a ruling of a prior judge.

We submit that the Third Circuit rule is the preferable rule. The case at bar is an excellent illustration since it involves dismissal of a counterclaim arising out of the same accident. There was therefore, no possibility that the parties could be spared the expense of trial.*

More importantly the present case is a particularly clear cut example of the "judge shopping" condemned by the Third Circuit.

Petitioner's counterclaim in negligence for the value of her horse, "Star of Roses" was dismissed by the trial court (Levet, D. J.) after a so-called "separate trial" (92a-95a)

---

*Indeed petitioner requested the trial court to certify a question for purposes of an interlocutory appeal but the request was denied.

which was nothing more than respondent's third identical effort for summary judgment (see 16a, 72a, 89a, 94a).

Judge Levet based his dismissal upon the notion that the general verdict against petitioner in *Brite* v. *Graham* was *res judicata* on the issue of respondent's negligence despite the fact that respondent was not a party to the prior action. This theory previously was twice rejected in well considered opinions by Judge Kaufman who denied respondent's earlier motions for summary judgment (63a, 79a).

Judge Kaufman properly held in both opinions that it was impossible to determine whether the jury's general verdict in the *Brite* action was based on negligence or absolute liability. He found that both issues were submitted. If the *Brite* jury could have assessed liability on the absolute liability theory (69a, 79a, 97a), then petitioner's counterclaim based on respondent's negligence, which was not in issue on the absolute liability theory, could not be dismissed on the ground of *res judicata*.

With the obvious purpose of circumventing Judge Kaufman's decisions, respondent moved on April 6, 1960, after assignment before Judge Levet, for a separate trial of the issues of *res judicata* pleaded in petitioner's supplemental reply (84a). In support of her motion respondent utilized the identical exhibits used on the motions for summary judgment (91a). The attorney's affidavit in support of the motion merely recites the papers to be used at the separate trial and conclusions concerning shortening of the trial and prejudice to plaintiff. Despite such an obvious device to have a third try at summary judgment, Judge Levet granted the motion for a separate trial (92a) on April 21, 1960. He immediately proceeded to hear that trial which consisted of merely accepting the pleadings, judgment and charge previously used on the motions for summary judgment (92a-95a). Upon receipt of the documents, the

court directed that the counterclaim be dismissed on the merits (95a); read into the record a previously prepared opinion (96a-98a); and denied certification for purposes of an interlocutory appeal.

Peculiarly, the opinion discloses no reason for granting severance under Rule 42(b) (96a-99a). Judge Levet dismissed defendant's counterclaim on the ground that whereas Judge Kaufman could not be certain as to the basis for the jury verdict in the *Brite* action, he, Judge Levet, had no doubts whatsoever.* He therefore granted summary judgment because of *res judicata*.

We believe that this Court should determine the propriety of review by coordinate judges and resolve the conflict between the circuits on this issue. Moreover, the ready availability of coordinate review is a disruptive aspect of federal practice significant to all litigants.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW L. HUGHES
Attorney for Petitioner
220 East 42nd Street
New York 17, New York

October 2, 1961

---

*The Court of Appeals held that when the *Brite* charge is read as a whole it is evident that the case went to the jury on a negligence theory. Judge Levet, however, concluded (97a):

> "The issues in the Brite action determined in favor of Brite were:
>
> "(1) That Mrs. Graham's horse was vicious;
>
> "(2) That Mrs. Graham knew the horse was vicious;
>
> "(3) That Mrs. Graham was negligent;
>
> "(4) That the collision did not arise from any risk which Brite had assumed;
>
> "(5) That Brite was free from contributory negligence."

Rule 26.

Depositions Pending Action.

(d) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

* * *

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 42.

Consolidation; Separate Trials.

* * *

(b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim,

or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 46.

Exceptions Unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 49.

Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As

to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

Rule 51.

Instructions to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform

counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 5 1961
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 465

ELIZABETH N. GRAHAM, Individually and doing business as MAINE CHANCE FARM,

Petitioner,

v.

FANNIE K. HERTZ,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANDREW L. HUGHES
Counsel for Petitioner
220 East 42nd Street
New York 17, New York

INDEX TO SUPPLEMENTAL APPENDIX

PAGE

1. Opinion below, *Fannie K. Hertz* v. *Elizabeth N. Graham*, individually and doing business as *Maine Chance Farm*, 292 F. 2d 443 (2d Cir. 1961) 1a

2. Opinion, *Purcell, etc.* v. *Long Island Daily Press Publishing Co.*, 9 N. Y. 2d 255 (1961) 13a

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 150—October Term, 1960.

(Argued January 13, 1961 Decided July 3, 1961.)

Docket No. 26349

292 F. 2d 443

FANNIE K. HERTZ,

Plaintiff-Appellee,

—v.—

ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,

Defendant-Appellant.

Before:

CLARK, MAGRUDER and MOORE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, *Judge.*

Defendant appeals from a jury verdict awarding damages for the death of plaintiff's race horse as well as from the court's granting of interest up to the date of the judgment. Judgment for the plaintiff affirmed in part, and in part judgment for the plaintiff vacated and the case remanded to the District Court with directions.

WILLIAM J. MANNING, of Simpson Thacher & Bartlett, New York, N. Y. (Cyrus R. Vance and Rolon W. Reed, of Counsel), *for Plaintiff-Appellee.*

JOHN J. MACCHIA, of Townley, Updike, Carter & Rodgers, New York, N. Y. (J. Howard Carter and Lee W. Meyer, of Counsel), *for Defendant-Appellant.*

MAGRUDER, *Circuit Judge*:

Plaintiff owned a race horse named Speedy Wave. Defendant also owned one named Star of Roses. The two horses collided on the training track at Belmont Park and both were killed instantly. Plaintiff sued Mrs. Graham for the loss of Speedy Wave. Defendant counterclaimed for the loss of Star of Roses. The jury brought in a verdict giving damages to the plaintiff for the death of Speedy Wave. Judgment was entered pursuant to the jury verdict, from which the defendant takes the present appeal. Wesley E. Brite, an exercise boy in the employ of the plaintiff, had, prior to the present litigation, recovered the sum of $80,000 in a separate action for the injuries he received in the accident. *Brite* v. *Graham*, Civil Action No. 97-240.

The testimony of Brite and of Monte D. Parke, who was employed as Mrs. Hertz's trainer, was to the effect that, on the morning of October 17, 1954, Brite, mounted on Speedy Wave, and Parke, mounted on a pony, entered the training track at Belmont Park. Their purpose was to "breeze" their horse, that is, to run it a measured distance in a given time, in this instance ⅜ of a mile in 36 seconds. Upon entering the track Brite and Parke encountered defendant's exercise boy and her foreman by the inside rail holding a horse, later identified as Star of Roses, by means of a shank. Parke

called out to them, "You'd better get that horse off the track before you get run over." Star of Roses was led to the outside rail, and the exercise boy mounted it, though defendant's foreman still held onto the horse. Both Brite and Parke noted that Star of Roses was in this position when Brite started to breeze Speedy Wave in a counter-clockwise direction occupying only the inside rail, as was usual for breezing. The total width of the track was, as stated by both Brite and Parke, 90 to 100 feet. Neither of them related just what happened in the meantime. Parke testified that he saw the riderless Star of Roses running in a clockwise direction along the rail about "four jumps" before the accident. Brite did not see Star of Roses until the two horses were "10 or 15 feet away" from each other, and although he attempted to avoid the accident the horses collided.

The testimony tending to show that defendant had been guilty of negligence came entirely from three depositions which the district court admitted in evidence. These depositions, by George W. Cochrane, Peter G. Griffiths, and Patrick F. O'Neil, had been taken in the action brought by Brite against this same defendant to recover for his injuries. These three men had worked for the defendant at one time or another and their duties had included the training of Star of Roses. Mr. Cochrane, who was an assistant trainer for Mrs. Graham from April to June of 1954, deposed that Star of Roses was a "rogue" or "outlaw" which, unlike other two-year-old horses, had not been "broken" to gallop or breeze, but customarily would "duck to the left or to the right or would wheel completely around and dislodge his rider and run off." Each time Star of Roses was brought to the track without a lead pony, it succeeded in unseating its rider, said Mr. Cochrane. Griffiths, the trainer for five days in 1954, had similar experiences with Star of Roses, as did O'Neil, who from June, 1953, to May,

1954, was foreman and subsequently assistant trainer. O'Neil further observed Star of Roses on October 17, 1954, shortly before the accident in question. The horse went 100 yards down the track, dislodged its rider, then wheeled and ran clockwise along the rail. According to the depositions, Mrs. Graham did not allow those responsible for the training of the race horse to use spurs or whips, nor did she take notice of advice that Star of Roses was overstimulated sexually and should be gelded. Once Mrs. Graham awoke her trainer at midnight in order to fire him for having used a whip on Star of Roses. This trainer was said to be "one of the finest in the country."

We think it clear that there was sufficient circumstantial evidence submitted to the jury to justify a plaintiff's verdict that Mrs. Graham and her employees had been negligent and that this negligence had caused the accident. From the many recitals of unruly behavior, it was only natural to infer that Star of Roses merely repeated on the fateful morning what by then had become habitual with it. We cannot know with certainty the grounds upon which the jury based its finding of negligence, but many were available. Defendant knew the propensities of the beast but she did not prevent its being taken onto the track where other horses were apt to be breezing. Several methods of correcting Star of Roses' erratic behavior had been suggested: the horse could have been gelded; perhaps whipping would have deterred such conduct; a "ring" or "trap" or other device could have been used; a lead pony could have accompanied it onto the track.

Likewise it could not be said as a matter of law that the plaintiff or her employees were guilty of contributory negligence. When Brite started to breeze Speedy Wave, the inside rail was clear and Star of Roses was under restraint. Parke testified that he had no knowledge of the dangerous

propensities of Star of Roses, though he surmised upon entering the track that Star of Roses had been "unruly." We do not forget that if the danger had been seen by Parke he had a duty to use care to avoid it. But we cannot say that this is a case where, on the undisputed facts, contributory negligence would have to be found by a reasonable jury. *Torenes* v. *Park Motor Sales, Inc.*, 7 A. D. 2d 109 (1958), aff'd 7 N. Y. 2d 767 (1959). The verdict for the plaintiff must be affirmed on the merits unless there is some other reason for reversing it.

Defendant urges two grounds for reversal. First, she says that the court below erred in dismissing her counterclaim, alleging that the fatal collision was caused by the plaintiff's negligence, she being free of the same. Second, that the trial judge committed reversible error in admitting into evidence the three depositions referred to above.

As to defendant's counterclaim, we must inquire whether the doctrine of collateral estoppel called for a dismissal; and whether, even if it did, the trial judge committed reversible error in ordering a separate non-jury trial of this issue in the face of an earlier ruling by another judge of the district court refusing to grant a motion by the plaintiff for a summary judgment on the counterclaim based on the same ground. It seems that, after Brite had recovered in his suit against Mrs. Graham, the plaintiff, in the present action moved before Judge Kaufman for summary judgment on the defendant's counterclaim, asserting that the *Brite* action had conclusively established that Brite was not negligent and that the defendant was. Judge Kaufman, however, ruled that the *Brite* jury was given the alternative of basing its judgment on a theory of absolute liability for harboring a "dangerous animal" and that under New York law negligence was not an issue in that action. Since in Judge Kaufman's view *Brite* v. *Graham* had not

determined either defendant's negligence or plaintiff's contributory negligence, it followed that he denied the plaintiff's motion for summary judgment. 158 F. Supp. 201, 168 F. Supp. 755 (S. D. N. Y. 1957, 1958).

When this case came on for trial before Judge Levet, plaintiff moved under Rule 42(b) for a separate trial without a jury on the matters raised by defendant's counterclaim. Judge Levet agreed with Judge Kaufman that under the New York law recovery could be granted for harm caused by a domestic animal having dangerous propensities, without regard to negligence. See *Karlow* v. *Fitzgerald*, 288 F. 2d 411 (C. A. D. C. 1961). But Judge Levet felt that the *Brite* action had been presented, perhaps erroneously, in such a way that the jury necessarily determined that Brite was not, and the defendant was, negligent. So finding, he directed that the motion for dismissal of defendant's counterclaim should be granted, on doctrines of *res judicata*. This appears to be the New York law, which throughout the proceeding the parties have taken to be applicable to this question. *Israel* v. *Wood Dolson Co., Inc.*, 1 N. Y. 2d 116 (1956). See *Good Health Dairy Products Corp. of Rochester* v. *Emery*, 275 N. Y. 14 (1937).

If we thought that Judge Levet was right in his ruling, we could not sensibly upset his decision on the ground that he should have accepted Judge Kaufman's order on the same matter in the motion Judge Kaufman had previously determined. The district court's "law of the case" was not our "law of the case"; and certainly it was not the "law of the case" of the Supreme Court. See *White* v. *Higgins*, 116 F. 2d 312, 317 (1st Cir. 1940). It may be conceded to be unseemly for judges of co-ordinate jurisdictions to "review" one another's decisions, and ordinarily they do not do so. Yet in the past we have refused to reverse a case for the purpose of protecting the judicial sensibilities of the judge who first made a ruling on the matter. See *Dicto-*

graph Products Co., Inc. v. *Sonotone Corp.*, 230 F. 2d 131, 231 F. 2d 867 (2d Cir. 1956), which, we assume, has substantially impaired the apparently stronger statement in *Commercial Union of America, Inc.* v. *Anglo-South American Bank, Ltd.*, 10 F. 2d 937 (2d Cir. 1925)."

We have no doubt that Judge Levet was right in his conclusion that the jury in *Brite* v. *Graham* had determined the negligence issues. See Restatement, Judgments §§ 99, 107; *Good Health Dairy Products Corp. of Rochester* v. *Emery*, *supra*, 275 N. Y. 14. It is true that at one point in the charge of the court in that action reference was made to an absolute liability statement of §509 of the Restatement of Torts. But when the charge is read as a whole, it is evident that the court intended to leave the case to the jury on a negligence theory and that the jury would reasonably so have understood it. The court specifically charged the jury in *Brite* v. *Graham* that:

> "For plaintiff to recover he must establish by a fair preponderance of the evidence four things:
>
> "1. That the horse Star of Roses was a dangerous or vicious horse in the sense that I have defined this term to you, or had dangerous tendencies likely to cause injury to others;
>
> "2. That Mrs. Graham, or her agents or servants, knew or should have known that is was a dangerous or vicious horse or that it had such dangerous tendencies;
>
> "3. That having such knowledge, it was negligence for Mrs. Graham, or her servants or employees, to permit the horse to be or remain on the exercise track on the morning in question; and
>
> "4. That plaintiff is free from contributory negligence."

Furthermore the jury in the present case, in answer to a special interrogatory propounded by the court, found that defendant, Mrs. Graham, had been negligent, which was proof enough that it would have found in favor of the plaintiff on the defendant's counterclaim had that issue been submitted to it.

We find no error also in the way in which the trial judge dealt with the three depositions which defendant complains should not have been introduced into evidence. As has already been stated, these depositions were taken in the case of *Brite* v. *Graham*. In a pre-trial ruling, Judge Dawson had held that testimony and depositions from that action would be admissible even though the parties were different, "provided, however, that plaintiff meets the same requirements necessary for the reading of any deposition (Rule 26(d)(3) of the Rules of Civil Procedure)." 23 F. R. D. 17, 23 (S. D. N. Y. 1958). As a matter of fact, appellant does not question the correctness of Judge Dawson's basic ruling, but challenges only the conclusion by the district judge that the conditions of the proviso had been satisfied.

Rule 26(d)(3) permits the use in evidence of depositions when "the witness is at a greater distance than 100 miles from the place of trial or hearing * * * [or] the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or * * * that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." Plaintiff introduced Cochrane's deposition and read it into evidence without objection from the defendant. Before it was introduced and read to the jury, defendant's counsel had told the court that he had "some motions" which he would like

to address to the court with respect to the "lack of admissibility" of the depositions. But when asked directly whether there was "any objection to reading this deposition of Cochrane," he said he was concerned only with the form of some of the questions and answers. After reading the deposition, he indicated that "there is nothing there that I would object to."

The next day defendant's attorney objected to the introduction of the two other depositions, by Griffiths and O'Neil. These were taken in 1957 and showed on their face that the persons making them resided outside the jurisdiction. Griffiths was living in Long Beach, California; O'Neil's permanent residence was in Chicago, Illinois. When asked when he would be in New York O'Neil answered that he did not know. In colloquy, plaintiff's counsel said that he had inquired and had made "every attempt possible" but had been unable to locate Griffiths and O'Neil. Parke, who was familiar with the habitués of the track, confirmed this. Therefore, Judge Levet's "finding" that Griffiths and O'Neil were "at a greater distance than 100 miles from the place of trial or hearing" is unassailable. There was no evidence from which this court could conclude differently. See *Frederick* v. *Yellow Cab Co. of Philadelphia,* 200 F. 2d 483 (3d Cir. 1952). The court, upon assurance of counsel that he had been unable to locate Griffiths and O'Neil, allowed the two depositions to be read into the record, subject to a motion to strike if the plaintiff failed to verify that the witnesses were not around. At that time no mention was made of Cochrane's desposition. The presentation of the evidence to the jury was completed on that day. When the trial was resumed, plaintiff's counsel said he had found out that Cochrane in fact had been seen at Belmont. This was corroborated by the testimony of Parke. At this juncture defendant moved to have Cochrane's deposition stricken.

but the court ruled that defendant had waived her objection by failing to object in a more timely way. Instructions were then given to the jury by the trial judge and the trial was completed.

The trial court acted within its discretion in letting in the deposition. It is true that Rule 46 F. R. C. P. has obviated the necessity of formal exceptions or rulings, but a timely objection would have given the court an opportunity to make a ruling at a time when the plaintiff could have complied without prolonging the trial. "[D]ue regard to the importance of presenting the testimony of witnesses orally in open court," as stated in Rule 26(d)(3), did not require that Cochrane's deposition be stricken after it had been read into evidence without objection. There is to be sure no suggestion that the testimony in the depositions was unreliable. Defendant's witnesses testified solely as to the amount of damages.

There is, however, one point in the trial judge's action which does call for a reversal, namely, the allowance by the court of interest in the amount of $7,892.10 from the date of the accident which the trial judge added to the jury's verdict of $23,700.00. In taking this action, the trial judge relied upon various cases from New York lower courts, some of which we mentioned in *Newburgh Land & Dock Co.* v. *Texas Co.*, 227 F. 2d 732 (2d Cir. 1955). It is right that the New York law should be controlling in this matter. See *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, 313 U. S. 487 (1941); *Moore-McCormack Lines, Inc.* v. *Amirault*, 202 F. 2d 893, 896 (1st Cir. 1953). The lower New York courts, as indeed did we, *Newburgh Land & Dock Co.* v. *Texas Co.*, *supra*, and various commentators, 60 Harv. L. Rev. 1158 (1947), gathered from a dictum in *Flamm* v. *Noble*, 296 N. Y. 262, 268 (1947), that the New York Court of Appeals regarded

its previous decisions on interest as "manifestly unsound" and would reverse its prior rulings which had allowed interest as a matter of right in actions for conversion, but had left interest in actions for negligence to the determination of the jury. After the hearing on this appeal, the New York Court of Appeals, in *Purcell v. Long Island Daily Press Publishing Co., Inc.*, 9 N. Y. 2d 255 (1961), held that, however unsound this distinction might be, it must stand until changed by the legislature. Although obviously the trial judge could not be blamed for not giving heed to a decision by the Court of Appeals not yet rendered, we feel nevertheless bound to follow the latest published decision by that court, *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538 (1941). The New York law must be presumed to be that interest from the day of the accident is not allowed in this case as a matter of right. If federal law is involved, the exercise of discretion in the award of interest must be made by the jury, not by the court as a matter of law. See *Newburgh Land & Dock Co. v. Texas Co., supra*, 227 F. 2d 732, 735.

It might be that the jury, if it had been permitted to do so, would have allowed interest from the date of the accident as a matter of discretion in order to do more complete justice. The charge given by the court, to which no objection was taken (see Rule 51 F. R. C. P.), said nothing to the jury about interest, nor did the plaintiff mention the item of interest in her requests to charge. Naturally the jury did not exercise any "discretion" in the award of interest, but we do not think that the plaintiff should suffer by reliance upon our earlier interpretations of New York law in being deprived of the chance of a discretionary award of interest by the jury.

The judgment of the District Court is affirmed, so far as it is based upon the earlier verdict of the jury as to the

amount of the plaintiff's loss. Otherwise, the judgment of the District Court is vacated and the case is remanded to that Court for the trial by a jury of the issue of the discretionary award of interest on the amount of the plaintiff's loss, as found by the previous jury, unless the parties waive a jury trial, in which event the trial shall be to the Court, or unless the plaintiff withdraws her claim to interest; plaintiff recovers costs of this appeal.

STATE OF NEW YORK

COURT OF APPEALS

ARTHUR L. PURCELL, as Administrator of the Estate of DELLA PURCELL, Deceased, Respondent, *v.* LONG ISLAND DAILY PRESS PUBLISHING COMPANY, INC., Appellant.

Argued January 19 1961; decided March 2, 1961.
9 N. Y. 2d 255.

Purcell v. *Long Is. Daily Press Pub. Co.*, 11 A. D. 2d 814, modified.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 29, 1960, which affirmed (two of the Justices dissenting as to a part of the judgment) a judgment of the Supreme Court, entered in Kings County upon a verdict rendered at a Trial Term (JOHN E. CONE, J.), in favor of plaintiff.

FROESSEL, J. Plaintiff in this action, upon a jury determination in his favor, recovered damages sustained as the result of a fire in his decedent's building. The trial court, upon motion of counsel after rendition by the jury of their verdict (and absent a prior request that the matter be submitted to the jury), added to the amount awarded interest from the date of the fire, as a matter of right.

Two issues are presented on this appeal: The first relates to the merits, defendant contending that there was no negligence here with which it could be charged, and in that connection challenges the court's failure to charge several requests. The second issue concerns the propriety of the allowance of interest.

On the merits, we find no error here, and have no alternative but to sustain the verdict and its unanimous adoption by the courts below. Our disposition of the second question presented, however, as to the propriety of awarding interest, is otherwise. We are of the opinion that the power to allow interest in this case lay exclusively within the discretion of the jury, and, in consequence, it was error for the court to make such an award as a matter of right.

In *Flamm* v. *Noble* (296 N. Y. 262) we were called upon to decide whether interest was allowable as of right upon a verdict in an action for fraud and duress. Chief Judge LOUGHRAN, holding that it was, reviewed the law pertaining to allowance of interest. Actions in contract, whether for a liquidated or unliquidated amount, were controlled by section 480 of the Civil Practice Act. Interest was there allowable as of right. In tort actions, the following principles then prevailed: "interest is recoverable of right in actions for trespass and conversion, whereas in actions for injuries done to property through negligence the allowance of interest is left to the discretion of the jury. (See *Wilson* v. *City of Troy*, 135 N. Y. 96 * * *)." (296 N. Y., *supra*, p. 268.) The *Wilson* case (135 N. Y. 96) squarely held that the award of interest in a negligence action was for the jury to determine.

In both *Wilson* and *Flamm*, the prevailing distinction between willful and nonwillful torts was criticized. As Chief Judge LOUGHRAN stated in *Flamm* (296 N. Y., *supra*, p. 268), "Such a distinction is manifestly unsound, because interest is essential to complete indemnity in both classes of cases." He was quick to note, however, immediately after the foregoing criticism (*Ibid.*): "But no decision of this court makes the recovery of interest a matter of discretion where, as here, damages are demanded for a money loss caused by fraud and duress. More than that,

Reno v. *Bull* (226 N. Y. 546)—an action for fraud—is authority the other way."

As the matter therefore stood at the time of *Flamm* (*supra*), interest was recoverable as of right in tort actions for conversion, trespass, fraud and duress. In actions involving negligent damage to property, the cases held that the power to make such an award was reposed exclusively in the jury or the trier of the facts (in addition to *Wilson* and *Flamm*, see, e.g., *Walrath* v. *Redfield*, 18 N. Y. 457, 462; *Parrott* v. *Knickerbocker Ice Co.*, 46 N. Y. 361, 369; see, also, *Maris* v. *Manhattan Real Estate Assn.*, 89 N. Y. 498, 507; *Moore* v. *New York Elevated R. R. Co.*, 126 N. Y. 671, 673); and, although we twice characterized this distinction as unsound, we did not declare the law otherwise.

Notwithstanding this criticism, by way of *dictum* in both *Wilson* and *Flamm* (*supra*), of the rule as applied in negligence actions, no corrective action has been taken by the Legislature. Their awareness of the law pertaining to allowance of interest, and inclination to effect a change where, in their judgment, it would serve a salutary purpose, is evidenced by the amendment in 1927 (L. 1927, ch. 623) of section 480 of the Civil Practice Act. That section superseded our decision in *Faber* v. *City of New York* (222 N. Y. 255) which dealt with a nonliquidated contract claim. So, too, the Legislature has provided for interest on awards in wrongful death actions from the date of decedent's death by express provision of section 132 of the Decedent Estate Law.

In our opinion, any change in the rules governing allowance of interest in negligence actions, as here, must similarly await legislative action. The established line of Court of Appeals authority in this area—which, in fact, though criticizing the rule twice, at the same time preserved it—clearly compels this conclusion.

Plaintiff contends that the "courts of this state have consistently followed the rule suggested by this court in *Flamm*". But this is not so. The two Court of Appeals cases cited by plaintiff were decided before *Flamm*, viz., *Sciaky* v. *Rogers & Hagerty* (277 N. Y. 483) and *Weprin & Glass Bldg. Corp.* v. *Rosoff Subway Constr. Co.* (269 N. Y. 672). In the *Weprin* case, however, our decision was based upon defendant's contract with the city, and we held that under such contract its liability was absolute, and was more than a covenant of indemnity; that the case, therefore, fell within the provisions of section 480 of the Civil Practice Act. In *Sciaky*, which appears to have involved a situation similar to that in *Weprin*, we allowed interest from the time of damage, but solely on the authority of the *Weprin* case. The lower court cases cited by plaintiff were clearly and succinctly distinguished in the dissenting opinion below.

In terms of policy consideration, moreover, the implications of a projected change by us in this area of the law are quite serious. Were interest declared to be allowable as of right in this case, we would be constrained to extend the benefits of such rule to plaintiffs in actions for personal injuries—especially where claims for lost wages and medical and hospital expenses (actual out-of-pocket losses and expenditures) are involved. Compulsory addition of interest to such awards to cover periods of six to eight years or more, which it often takes for final judgment to be reached, would serve to inflate these verdicts far beyond their already high levels. If the principle of full indemnity is invoked, such awards should logically bear interest from the occurrence of the act complained of, for negligence is negligence, whether causing injury to person or property. Such drastic changes in the law should be legislatively, and not judicially, effected.

It should be stressed, of course, that by preserving the law in its present posture the principles of justice and fair-

ness are not offended, for those whose property is destroyed or damaged by the negligent conduct of others may still recover interest. The jury, however, must award it to them and, if plaintiff had asked for it here, he might well have received it.

Accordingly, the judgment appealed from should be modified by disallowing any interest upon the verdict of the jury, and in all other respects affirmed, without costs.

FULD, J. (dissenting in part). I would affirm the judgment in its entirety, for I believe, with the courts below, that the plaintiff is entitled to interest as a matter of law.

There can be no doubt that an award of interest is necessary to afford a plaintiff, whose property has been damaged, full indemnity for the wrong done to him by the defendant. And it is equally indisputable that on principle such a plaintiff, whether his property is lost to him through the defendant's willfulness or negligence, is entitled to interest, as part of his damages, as a matter of right. Indeed, Chief Judge LOUGHRAN said precisely this when, on behalf of a unanimous court, he declared just a few years ago in *Flamm* v. *Noble* (296 N. Y. 262, 268): "We come then to the question whether the plaintiff is entitled to interest as matter of law. Under a long-settled New York rule, interest is recoverable of right in actions for trespass and conversion, whereas in actions for injuries done to property through negligence the allowance of interest is left to the discretion of the jury. (See *Wilson* v. *City of Troy*, 135 N. Y. 96, *supra*.) *Such a distinction is manifestly unsound, because interest is essential to complete indemnity in both classes of cases.*" (Emphasis supplied.)

Flamm v. *Noble* dealt with damages occasioned by fraud and duress and, consequently, the court was not called upon to overrule the earlier cases which had created the distinction stamped by the court as "manifestly unsound", but I have no

doubt that the court meant what it said and that, had it been necessary for decision, we would have put an end to the distinction thus forthrightly condemned. The case before us does involve damages for negligent injury to property, and we should now *do* what we *said* in *Flamm*—and what the Appellate Division for both the First and Second Departments understood us to say (*Harmon & Regalia* v. *City of New York*, 286 App. Div. 825 [1st Dept.]; *Johnson* v. *Scholz*, 276 App. Div. 163, 165 [2d Dept.], in addition to case before us, 11 A D 2d 814; see, also, *Sandak* v. *Combs*, 26 Misc. 2d 478 [App.Term, 2d Dept.])—and expressly overrule those earlier cases.

Although the majority acknowledges this court's repeated characterization of the distinction as "unsound", it nevertheless insists that any change in rule "must * * * await legislative action" (opinion, p. 258). With this, I cannot agree. Since the rule was court-created and court-developed, no obstacle exists to prevent the court from modifying it and announcing the doctrine which, following the modern trend (see Note, 60 Harv. L. Rev. 1158), accords with principles of reason and justice. (See *Bing* v. *Thunig*, 2 N Y 2d 656; *Woods* v. *Lancet*, 303 N. Y. 349.)

The rule as originally formulated in this State, as in England, was that interest as part of the damages to property in actions of conversion and trespass could only be had at the discretion of the jury. (*See Beals* v. *Guernsey*, 8 Johns. 446; *Hyde* v. *Stone*, 7 Wend. 354; *Bissell* v. *Hopkins*, 4 Cow. 53; *Rowley* v. *Gibbs*, 14 Johns. 385.) Recognizing that such a rule was illogical because "interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages, is not any more in the discretion of the jury than the value", the courts, without waiting for the Legislature to act, "gradually abandoned" the rule (See *Wilson* v. *City of Troy*, 135

N. Y. 96, 104.) "What seemed to be the demands of justice", wrote the court in the *Wilson* case (135 N. Y., at pp. 103-104), "did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution."

The "demands of justice" now require recognition that in a case of negligent injury to property, no less than in one of intentional injury, complete indemnity must necessarily include interest on the value of the property damaged. And, just as the courts did not require legislative action to justify allowance of interest as of right where the property was willfully converted, so, there is need for them to await such action in order to deal justly in those cases where the property has been negligently damaged. What the court itself has created, it may change and, since this court has on at least two occasions criticized the ancient rule as unsound, we should now abandon it and allow the plaintiff interest on the value of the property damaged through the defendant's carelessness.

Chief Judge DESMOND and Judges DYE, VAN VOORHIS, BURKE and FOSTER concur with Judge FROESSEL; Judge FULD dissents in part in a separate opinion.

Judgment modified in accordance with the opinion herein and, as so modified, affirmed, without costs.

Office Supreme Court, U.S.
FILED
OCT 31 1961
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 465.

ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,

Petitioner,

against

FANNIE K. HERTZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

EDWIN L. WEISL,
WILLIAM J. MANNING,
ROLON W. REED,
120 Broadway,
New York 5, N. Y.,
Attorneys for Respondent.

SIMPSON THACHER & BARTLETT,
Of Counsel.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Statement of the Case	2
Reasons for Denying the Writ	5
POINT I.—The remand below raises no conflict with State law, no constitutional question, and no other issue for review by this Court	5
POINT II.—The admission of the depositions presents no conflict with any other circuit and no other question for review by this Court	8
POINT III.—Petitioner's complaints about the Special Verdict raise no issue for review by this Court	12
POINT IV.—The dismissal of petitioner's counterclaim presents no conflict with any other circuit and no other question for review by this Court	13
CONCLUSION	16
APPENDIX	A-1

TABLE OF CASES.

	PAGE
Appalachian Power Co. v. *American Institute of Accountants*, 4 L. Ed. 2d 30, 80 S. Ct. 16, not officially reported, denying stay pending review of 268 F. 2d 844 (2nd Cir.), *cert. denied*, 361 U. S. 887 (1959)	9
Beedy v. *Washington Water Power Co.*, 238 F. 2d 123 (9th Cir. 1956)	14
Cate v. *Good Bros., Inc.*, 181 F. 2d 146 (3rd Cir.), *cert. denied*, 340 U. S. 826 (1950)	13
Flamm v. *Noble*, 296 N. Y. 262, 72 N. E. 2d 886 (1947)	5, 7
Frederick v. *Yellow Cab Co.*, 200 F. 2d 483 (3rd Cir. 1952)	9, 10
Gasoline Prods. Co. v. *Champlin Refining Co.*, 283 U. S. 494 (1931)	7
Good Health Dairy Prods. Corp. v. *Emery*, 275 N. Y. 14, 9 N. E. 2d 758 (1937)	15
Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U. S. 271 (1949), *prior decision adhered to*, 339 U. S. 605 (1950)	9
Hertz v. *Graham*, 23 F. R. D. 17 (S. D. N. Y. 1958)	9
Hertz v. *Graham*, 292 F. 2d 443 (2nd Cir. 1961)	1, 6, 9, 10, 11, 12, 15
Hinchey v. *Sellers*, 7 N. Y. 2d 287, 165 N. E. 2d 156 (1959)	15
Hosie v. *Chicago & North Western R. Co.*, 282 F. 2d 639 (7th Cir. 1960), *cert. denied*, 365 U. S. 814 (1961)	8
Israel v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97 (1956)	15
Neckwear Corp. v. *First National City Bank*, 275 F. 2d 295 (1st Cir. 1960)	9, 10
Newburgh Land & Dock Co. v. *Texas Co.*, 227 F. 2d 732 (2nd Cir. 1955)	4, 6

PAGE

Portland General Electric Co. v. *United States*, 323 U. S. 761 (1944) 2

Povanda v. *Powers*, 152 Misc. 75, 272 N. Y. Supp. 619 (Sup. Ct. N. Y. Co. 1934) 12

Purcell v. *Long Island Daily Press Pub. Co.*, 9 N. Y. 2d 255, 173 N. E. 2d 865 (1961) 4, 5, 6, 7

Rosensweig v. *State*, 208 Misc. 1065, 146 N. Y. S. 2d 589 (Ct. Cl. 1955), *rev. on other grounds*, 5 A. D. 2d 293, 171 N. Y. S. 2d 912 (3rd Dept. 1958), *aff'd.* 5 N. Y. 2d 404, 158 N. E. 2d 229 (1959) 12

TCF Film Corp. v. *Gourley*, 240 F. 2d 711 (3rd Cir. 1957) 14

Thedorf v. *Lipsey*, 237 F. 2d 190 (7th Cir. 1956) 13

United Air Lines, Inc. v. *Wiener*, 286 F. 2d 302 (9th Cir.), *cert. denied*, 366 U. S. 924 (1961) 8

United States v. *Wheeler*, 256 F. 2d 745 (3rd Cir. 1958) 14, 15

White v. *Zutell*, 161 F. Supp. 567 (S. D. N. Y. 1958), *aff'd*, 263 F. 2d 613 (2nd Cir. 1959) 4, 6

STATUTES AND RULES.

28 U. S. C. §2101(e) 2, A-1

Fed. R. Civ. P. 26(d)(3) 8

Fed. R. Civ. P. 49 13

AUTHORITIES.

Robertson & Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §§333, 412 (1951) 2, 6, 9

Supreme Court of the United States

OCTOBER TERM, 1961

No. 465.

ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,

Petitioner,

against

FANNIE K. HERTZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

This common law negligence action is a federal action solely because of diversity of citizenship. Petitioner seeks review of a unanimous opinion of the Court of Appeals affirming the general and special verdicts of the jury below, which was the second jury to find that petitioner's negligence caused the collision in question.

Opinion Below.

The opinion of the Court of Appeals is officially reported at 292 F. 2d 443.

Jurisdiction.

Respondent believes that the jurisdictional statement contained in the petition (p. 2) is defective. The petition was filed with this Court on October 2, 1961. It refers to the "opinion" of the Court of Appeals, but fails to mention that judgment was entered in that court on July 3, 1961. Since the petition was filed after the entry of judgment by the Court of Appeals, the petition cannot be treated as one to review a case before judgment. See 28 U. S. C. §2101(e), printed *infra* at p. A-1. Respondent submits that once judgment is entered below, a petition for certiorari must be addressed to that judgment. See *Robertson & Kirkham*, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §412 (1951), discussing the denial of certiorari in *Portland General Electric Co.* v. *United States*, 323 U. S. 761 (1944).

Statement of the Case.

On October 17, 1954, respondent's horse was struck and killed by petitioner's riderless runaway horse on the training track at Belmont Park, Elmont, New York (120a-124a, 168a).* Both horses were killed in the collision (176a), and Wesley Brite, respondent's exercise boy who was riding her horse at the time, was injured (20a). Two actions were brought in the Southern District of New York against petitioner, one for the value of respondent's horse, and the other for injuries sustained by Wesley Brite.

With the exception that Brite's claims were for personal injuries and respondent's claims for property damage, the amended complaint in the *Brite* action is substan-

---

* Unless otherwise noted, such numbers refer to pages of Appendix to Appellant's Brief in the Court of Appeals.

tially identical to the complaint in this action (88a). With the exception that petitioner interposed a counterclaim in this action for the loss and destruction of her horse, her amended answer to Brite's amended complaint is substantially identical to the answer in this action (88a). The *Brite* action was tried first, and Brite recovered a jury verdict against petitioner in the amount of $80,000, judgment therefor being entered on May 7, 1957 (88a).

After the *Brite* judgment became final (88a), respondent moved in this action for leave to file a supplemental reply alleging that petitioner's counterclaim was barred by the *Brite* judgment because the matters alleged in the counterclaim had become *res judicata*. Respondent also moved for summary judgment on this defense (16a-21a). By order entered February 13, 1958, the District Court (Kaufman, D. J.) granted respondent leave to file a supplemental reply raising the *res judicata* defense, but denied the motion for summary judgment thereon (81a-82a).

Before this action was assigned to any district judge for trial, respondent served notice upon petitioner that upon such assignment, respondent would apply for a prior separate trial without jury of the issues raised by the supplemental reply (Appendix, *infra* p. A-3). The case was assigned to Honorable Richard H. Levet, D. J., for trial, and at the first pretrial conference in his chambers on April 6, 1960, respondent served and filed her motion for such separate trial (84a-90a). On April 12, 1960 the merits of this motion were argued before Judge Levet in chambers. On April 21, 1960 respondent's motion was granted (92a) and the separate trial was thereupon held in open court without jury (92a-95a). At the conclusion of this separate trial, petitioner's counterclaim was dismissed on the merits (95a).

Thereafter, the other issues in this action were tried before Judge Levet and a jury from April 25 through April 28, 1960 (2a). On April 28, the jury rendered special verdicts in favor of respondent and a general verdict in the sum of $23,700 (102a). The next day, Judge Levet's opinion dismissing petitioner's counterclaim was filed. On May 9, 1960, judgment was entered in the District Court (2a), dismissing petitioner's counterclaim on the merits and awarding respondent the sum of $23,700, together with interest on that sum from the date of loss in the amount of $7,892.10 (105a).

On May 25, 1960, petitioner filed a notice of appeal to the Court of Appeals (2a). The merits of petitioner's appeal were argued before the Second Circuit on January 13, 1961. On March 2, 1961, while petitioner's appeal was *sub judice*, the New York Court of Appeals filed its opinion in *Purcell* v. *Long Island Daily Press Pub. Co.*, 9 N. Y. 2d 255, 173 N. E. 2d 865 (1961). The *Purcell* decision held that under New York law a plaintiff is not entitled as a matter of right to interest on a jury verdict for damages to property through negligence. Prior to the *Purcell* decision, the Second Circuit in *Newburgh Land & Dock Co.* v. *Texas Co.*, 227 F. 2d 732 (2nd Cir. 1955) and the District Court (Levet, D. J.) in *White* v. *Zutell*, 161 F. Supp. 567 (S. D. N. Y. 1958), *aff'd*, 263 F. 2d 613 (2nd Cir. 1959) had interpreted New York law to allow such interest as a matter of right.

The opinion of the Court of Appeals in this action was filed on July 3, 1961 and its judgment was entered the same day (Appendix, *infra* p. A-1). That judgment affirmed the judgment of the District Court in so far as it awarded respondent the sum of $23,700 on the general verdict of the jury, vacated the judgment of the District Court in so far as it awarded respondent interest on the verdict from the

date of loss, and remanded this case to the District Court for trial by a jury of the sole question whether respondent should receive interest on the previous verdict.

On July 20, 1961, judgment was entered in the District Court in accordance with the judgment of the Court of Appeals. This case is presently on the jury calendar of the District Court awaiting trial of the issue remanded and bearing Calendar No. 93.

Reasons for Denying the Writ.

The remand of the interest issue raises no conflic with state law, no constitutional problem and no other qu stion of importance to anyone other than the litigants. Peti tioner's other three "Questions Presented" simply raise the same erroneous factual arguments and unfounde procedural objections previously rejected by a unan nous Court of Appeals. The petition thus presents no iss for review by this Court.

POINT I.

The remand below raises no conflict with ate law, no constitutional question, and no other issu for review by this Court.

The petition claims that the remand to the D rict Court for trial by a jury of the sole question wh her respondent should receive interest on the previous v lict is "directly in conflict with the decision of" the New ork Court of Appeals in *Purcell* v. *Long Island Daily Pres ub. Co.*, 9 N. Y. 2d 255, 173 N. E. 2d 865 (1961). The urt there decided only that its dictum in *Flamm* v. *Nobl* 296

N. Y. 262, 72 N. E. 2d 886 (1947) had not changed the New York rule that a plaintiff is not entitled as a matter of right to interest on a jury verdict for damages to property through negligence.

Purcell made it clear that interest on such a verdict must be awarded by a jury. The opinion, however, says nothing one way or the other about a new trial by a second jury on the question of interest. *Purcell* does not hold that a new trial "could not be obtained" in New York, as petitioner suggests. Thus the Second Circuit's handling of the interest question scarcely presents a direct conflict worthy of review by this Court. See *Robertson & Kirkham*, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §333 (1951).

Further, it is difficult to see how the remand raises any important public question in view of the unique circumstances of its exercise. The Second Circuit, while recognizing that neither party requested submission of the interest question to the jury below, exercised its discretion to rectify a situation which resulted directly from its apparent misinterpretation of New York law in *Newburgh Land & Dock Co.* v. *Texas Co.*, 227 F. 2d 732 (2nd Cir. 1955) which was followed by Judge Levet in *White* v. *Zutell*, 161 F. Supp. 567 (S. D. N. Y. 1958), *aff'd*, 263 F. 2d 613 (2nd Cir. 1959) and in this case.

The Second Circuit explained:

> "[W]e do not think that the plaintiff [respondent] should suffer by reliance upon our earlier interpretions of New York law in being deprived of the chance of a discretionary award of interest by the jury." (292 F. 2d at 449)

The remand was clearly confined to the facts of this case, and there is no showing in the petition that it would

affect any other litigants. Indeed, it is not clear that the remand will have any substantive effect on petitioner because the trial of the issue remanded has not been held and that part of the judgment is not final.

Petitioner's second complaint about the remand is that another jury cannot consider the question of interest on the sum already awarded as damages without violating petitioner's constitutional right to trial by jury. This is said to be so, because the two issues are supposedly too interwoven to be tried separately without confusion and uncertainty.

The question of interest, however, is not at all related to the question of value already decided by the jury below. Judge Levet charged the jury that, as to any award of damages, they were to consider only "the market value of the plaintiff's horse at the time and the place of the loss, that is, October 17, 1954" (356a).

Under New York law the question of interest on a verdict for damages to property is a question of full or complete indemnity, bearing no relation to liability, culpability or the value of the property involved. See *Purcell* v. *Long Island Daily Press Pub. Co.*, 9 N. Y. 2d 255, 173 N. E. 2d 865 (1961); *Flamm* v. *Noble*, 296 N. Y. 262, 72 N. E. 2d 886 (1947). Full or complete indemnity involves nothing more than the loss of use of the horse or the loss of use of the money it would have brought had it been sold. The jury was not instructed even to consider these factors in determining the market value of the horse at the time it was destroyed. Nor would a second jury have to redetermine the market value of the horse to decide whether interest from the date of loss is necessary for full or complete indemnity. Thus, the remand raises no constitutional question. See *Gasoline Prods. Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 498 (1931).

Finally, the remand does not conflict with the decisions in *Hosie* v. *Chicago & North Western R. Co.*, 282 F. 2d 639 (7th Cir. 1960), *cert. denied*, 365 U. S. 814 (1961) and *United Air Lines, Inc.* v. *Wiener*, 286 F. 2d 302 (9th Cir.), *cert. denied*, 366 U. S. 924 (1961), as petitioner suggests. In *Hosie*, the Seventh Circuit expressly declined to pass on the question whether a constitutional issue is raised when some issues are submitted to one jury and other issues to another jury. *Wiener* simply decided that because exemplary damages were there sought, the degree of culpability was necessarily involved in the question of damages. The Ninth Circuit expressly confined its decision in *Wiener* to the facts before it, refusing to say that a separate jury can never determine the issue of damages after another jury has determined the issue of liability.

There is thus no basis for asking this Court to review the remand.

POINT II.

The admission of the depositions presents no conflict with any other circuit and no other question for review by this Court.

Petitioner has asked this Court to hear her argument that the deposition testimony of three witnesses, Cochrane, Griffiths and O'Neil, former employees of petitioner, which was read into evidence at trial, should have been excluded from evidence, because respondent supposedly failed to comply with Fed. R. Civ. P. 26(d)(3).

Petitioner is not contending here nor did she contend below that these depositions, as read at trial, were inadmissible under the rules of evidence. Petitioner is not here challenging nor did she challenge below the pretrial ruling,

reported at 23 F. R. D. 17 (S. D. N. Y. 1958), in which the District Court (Dawson, D. J.) granted respondent leave to read any of these three depositions at the trial. Petitioner merely contends that Judge Levet's finding of fact that one of the conditions of Rule 26(d)(3) had been satisfied and the Second Circuit's concurrence therein were erroneous.

In sum, petitioner asks this Court to review a finding of fact and an application of a Federal Rule by a District Judge in which the Court of Appeals has unanimously concurred. Such questions do not warrant review by this Court in the absence of a very obvious and exceptional showing of error. See *Appalachian Power Co.* v. *American Institute of Accountants*, 4 L. Ed. 2d 30, 80 S. Ct. 16, not officially reported, denying stay pending review of 268 F. 2d 844 (2nd Cir.), *cert. denied*, 361 U. S. 887 (1959); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U. S. 271 (1949), *prior decision adhered to*, 339 U. S. 605 (1950); *Robertson & Kirkham*, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §333 (1951) and cases cited therein.

In a vain attempt to show error, petitioner repeatedly suggests that she was deprived of her right to cross-examine these deposees because of the lower courts' rulings, an argument which conveniently ignores the fact that no attempt was made at trial to challenge the credibility of these deposees, either by rebuttal testimony or by reading the extensive cross-examination contained in each of the three depositions and conducted by petitioner's counsel in the prior action. In the words of the Second Circuit, the record contains "no suggestion that the testimony in the depositions was unreliable." (292 F. 2d at 448)

The petition also suggests that there is a conflict between *Neckwear Corp.* v. *First National City Bank*, 275 F. 2d 295 (1st Cir. 1960) on the one hand and *Frederick* v. *Yellow Cab*

Co., 200 F. 2d 483 (3rd Cir. 1952) and the decision below on the other. This is entirely erroneous.

In *Neckwear*, the First Circuit held the deposition there in question admissible even in the absence of any finding concerning the availability of the witness, because the evidence which would have shown unavailability was erroneously excluded. Contrary to petitioner's statement (p. 16), this case says nothing about any burden of proof concerning the unavailability of a deposee.

In *Yellow Cab*, a deposition was admitted even though the attorney offering it merely cited portions of the deposition where the witness stated that he was occasionally absent from the jurisdiction for business reasons, and told the Court that he had learned from someone other than the witness that the witness would not be available "today or tomorrow". The Third Circuit upheld the admission, saying:

> "Unquestionably, the showing on this issue was scant. Yet there was no showing at all in opposition. * * * On what was before him, the trial judge apparently concluded that the witness was in fact out of the jurisdiction and . . . we cannot say on this record that the trial judge was wrong in concluding that the conditions under which Rule 26(d)(3) permits the use of a deposition existed here." (200 F. 2d at 486)

In the case at bar, the Second Circuit upheld the admission of the Griffiths and O'Neil depositions, saying:

> "These [depositions] were taken in 1957 and showed on their face that the persons making them resided outside the jurisdiction. Griffiths was living in Long Beach, California; O'Neil's permanent residence was in Chicago, Illinois. When asked when he would be in New York O'Neil answered that he did not know. In colloquy, plaintiff's counsel said that he had inquired

> and had made 'every attempt possible' but had been unable to locate Griffiths and O'Neil. Parke, who was familiar with the habitués of the track, confirmed this. Therefore, Judge Levet's 'finding' that Griffiths and O'Neil were 'at a greater distance than 100 miles from the place of trial or hearings' is unassailable. There was no evidence from which this court could conclude differently." (296 F. 2d at 448)

Finally, petitioner pretends (p. 20) that she is "unable to explain why the trial court or the Court of Appeals . . . found a waiver" as to the Cochrane deposition. The record shows that the Cochrane deposition was read into evidence only after petitioner's counsel stated that "there is nothing there that I would object to" (224a). After presentation of evidence to the jury was completed (305a), and two days after the Cochrane deposition was read, petitioner's counsel moved to strike it (312a).

The Second Circuit, in affirming the denial of this motion, stated:

> "The trial court acted within its discretion in letting in the [Cochrane] deposition. It is true that Rule 46 F. R. Civ. P. has obviated the necessity of formal exceptions or rulings, but a timely objection would have given the court an opportunity to make a ruling at a time when the plaintiff could have complied without prolonging the trial. '[D]ue regard to the importance of presenting the testimony of witnesses orally in open court,' as stated in Rule 26(d)(3), did not require that Cochrane's deposition be stricken after it had been read into evidence without objection." (292 F. 2d at 448)

There is accordingly no foundation for asking this Court to review the admission of these depositions.

POINT III.

Petitioner's complaints about the Special Verdict raise no issue for review by this Court.

Petitioner also asks this Court to review her complaints concerning the form of Special Verdict submitted to the jury. The petition (p. 22) concedes that the Court of Appeals found this argument to be unworthy of comment, but asserts that the omission from Sections B and C of the Special Verdict (103a-105a) of a question based on assumption of risk was "gross error."

The law of New York, however, is clearly contrary to petitioner's assertion. Sections B and C of the Special Verdict relate to respondent's causes of action based upon negligence. Once the jury found that petitioner's negligence caused the accident and that respondent was free from contributory negligence, the doctrine of assumption of risk, as a matter of substantive law, was inapplicable, because under New York law a participant in a sport does not assume the risk of injury caused by the negligence of another. *Rosensweig* v. *State,* 208 Misc. 1065, 146 N. Y. S. 2d 589 (Ct. Cl. 1955), *rev. on other grounds,* 5 A. D. 2d 293, 171 N. Y. S. 2d 912 (3rd Dept. 1958), *aff'd,* 5 N. Y. 2d 404, 158 N. E. 2d 229 (1959); *Povanda* v. *Powers,* 152 Misc. 75, 272 N. Y. Supp. 619 (Sup. Ct. N. Y. Co. 1934).

Thus no procedural error was committed in failing to include a question inapplicable to the case under New York law. Indeed, any question as to the propriety of the form of the Special Verdict is foreclosed by the unchallenged finding of the Court of Appeals that "there was sufficient circumstantial evidence submitted to the jury to justify a plaintiff's verdict that Mrs. Graham and her employees had

been negligent and that this negligence caused the accident." (292 F. 2d at 445)

Even though the decision below contains no mention of the Special Verdict, petitioner suggests that the decision conflicts with *Cate* v. *Good Bros., Inc.*, 181 F. 2d 146 (3rd Cir.), *cert. denied*, 340 U. S. 826 (1950) and *Thedorf* v. *Lipsey*, 237 F. 2d 190 (7th Cir. 1956). Neither of these cases state that it is improper under Federal Rule 49 to submit "conclusory fact and law questions" to a jury, as petitioner claims. Each merely held that it is not error for a trial judge to refuse to instruct a jury on the legal consequences of its resolution of factual issues presented by a special verdict. No such issue is involved in this case.

There is thus no reason for this Court to review petitioner's complaints about the form of the Special Verdict.

POINT IV.

The dismissal of petitioner's counterclaim presents no conflict with any other circuit and no other question for review by this Court.

Petitioner urges this Court to hear her complaints concerning the dismissal of her counterclaim, because the dismissal was an allegedly improper "review" by Judge Levet of the decision of Judge Kaufman, and because the Second Circuit's unanimous affirmance purportedly raises a conflict with the decisions of other circuits. Petitioner's claims that there was "review" here and that it was an abuse of discretion conveniently ignore the factual situation under which Judge Levet's decision to dismiss the counterclaim occurred.

After the judgment in the prior action had become final (88a), respondent moved in this action for leave to serve

a supplemental reply asserting that petitioner's counterclaim was *res judicata* and for summary judgment dismissing the counterclaim (16a-21a). Judge Kaufman granted the motion for leave to file the supplemental reply but denied summary judgment (81a-82a). He did not decide the *res judicata* question on the merits, because he allowed the defense to be pleaded yet neither dismissed nor sustained it. Thus Judge Levet was compelled to try the *res judicata* defense in order to determine finally all the issues in the action (98a). In doing so, he was not "reviewing" a prior decision on the merits, but merely deciding an issue in the case which was properly before him for decision.

There is no foundation for the claim that the Court of Appeals' refusal to reverse Judge Levet's decision conflicts with the decisions in *United States* v. *Wheeler*, 256 F. 2d 745 (3rd Cir. 1958) and *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (3rd Cir. 1957) and with the "principle" of *Beedy* v. *Washington Water Power Co.*, 238 F. 2d 123 (9th Cir. 1956).

In the *TCF Film* case and in the *Beedy* case, the second judge's "review" of the first judge's ruling was sustained. In the *Wheeler* case, the Third Circuit explicitly recognized that a district judge has the power to review the prior decision of another district judge. The second decision in *Wheeler* was reversed because the Third Circuit found the review to be an abuse of discretion under the circumstances of that case. There, the second judge had granted a previously denied motion to suppress evidence and to dismiss the case. An immediate appeal followed without any intervening trial. In *Wheeler*, the second decision, if improper, was prejudicial error, because it fundamentally affected the outcome of the case.

In the case at bar, there was no occasion for the Second Circuit to decide whether it was an abuse of discretion for

Judge Levet to "review" the decision of Judge Kaufman, because there was no review. Judge Levet did not entertain a second motion for summary judgment. He decided a triable issue left open for him to resolve in a case assigned to him for trial of all issues. Thus the sole question before the Court of Appeals was whether Judge Levet's decision *was correct. Since the Court of Appeals unanimously* decided that it was correct, no penchant for consistency could sensibly require reversal merely because another district judge might disagree with it.

And unlike the situation in *Wheeler*, between the dismissal of the counterclaim by Judge Levet and its review by the Court of Appeals, there was an intervening jury verdict explicitly finding that the negligence of petitioner caused the collision which was the subject matter of her counterclaim. As the Second Circuit stated:

> "Furthermore, the jury in the present case, in answer to a special interrogatory propounded by the court, found that defendant, Mrs. Graham, had been negligent, which was proof enough that it would have found in favor of the plaintiff on the defendant's counterclaim had that issue been submitted to it." (292 F. 2d at 447)

At the point this case reached the Court of Appeals, therefore, the counterclaim was conclusively barred under New York law by the decision of the jury in this very case that Mrs. Graham had not been free from negligence. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97 (1956); *Good Health Dairy Prods. Corp.* v. *Emery*, 275 N. Y. 14, 9 N. E. 2d 758 (1937); see also *Hinchey* v. *Sellers*, 7 N. Y. 2d 287, 165 N. E. 2d 156 (1959). Thus, even if Judge Levet's

decision had been incorrect, it would have been harmless error because of the intervening jury verdict in this case.

There is thus no basis for asking this Court to review the dismissal of the counterclaim.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN L. WEISL,
WILLLIAM J. MANNING,
ROLON W. REED,
120 Broadway,
New York 5, N. Y.,
Attorneys for Respondent.

SIMPSON THACHER & BARTLETT,
Of Counsel.

November 1, 1961

APPENDIX.

28 U. S. C. §2101(e).

An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

Judgment Below.

UNITED STATES COURT OF APPEALS,

FOR THE

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of July, one thousand nine hundred and sixty-one.

Present:

Hon. CHARLES E. CLARK,
Hon. CALVERT MAGRUDER,
Hon. LEONARD P. MOORE,
Circuit Judges.

FANNIE K. HERTZ,
Plaintiff-Appellee,

v.

ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that that part of the judgment of said District Court so far as it is based upon the earlier verdict of the jury as to the amount of the plaintiff's loss be and it hereby is affirmed.

Further ordered, adjudged and decreed that that part of said judgment which allows interest be and it hereby is vacated and that the action be and it hereby is remanded in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

Respondent's Appendix in the Court of Appeals.

NOTICE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

FANNIE K. HERTZ,
Plaintiff,
against
ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,
Defendant.

Civil Action No. 39.

SIRS:

PLEASE TAKE NOTICE, that upon the assignment of this action to a District Judge for trial, the undersigned will make application to such Judge for a separate hearing and determination of the issues raised by plaintiff's Supplemental Reply, filed herein on April 23, 1959, by such Judge without a jury, prior to the submission of other issues in this action to trial by the court and jury.

Dated: New York, New York,
March 25, 1960.

Yours, etc.,

SIMPSON THACHER & BARTLETT,

By CYRUS R. VANCE,
A Member of the Firm,
Attorneys for Plaintiff,
120 Broadway,
New York 5, New York.

To:

Messrs. TOWNLEY, UPDIKE, CARTER & ROSE,
Attorneys for Defendant,
220 East 42nd Street,
New York 17, New York.